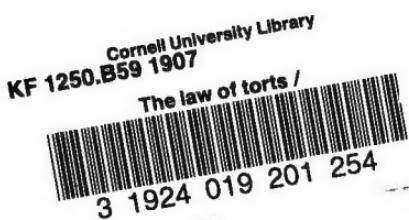
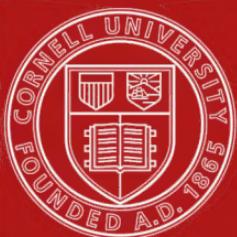


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THE LAW OF TORTS

THE LAW OF TORTS

BY

MELVILLE MADISON BIGELOW

PH.D. HARVARD

EIGHTH EDITION

BOSTON

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PREFACE

TO THE EIGHTH EDITION.

A NEW point of view has made its appearance out of the agitation of social movements, within the half dozen years since the last edition of this book was in hand. The struggle between equality and inequality — between the public and privilege, and between privilege as capital and privilege as labor — had not at that time proceeded far enough or long enough to make its meaning, much less the outcome, clear, and such cases as *Rice v. Albee* and *May v. Wood* in this country, and *Allen v. Flood* in England, might then have been regarded as in the legal succession of common-law logic, as indeed they were. Now we must look upon such cases as standing at the parting of the ways, but unconscious of the fact, and hence as looking backwards.

Since then the curtain has lifted somewhat and the social movement has found its place in the courts; though it is still uncertain whether equality or privilege will succeed in the end in making itself the will of the State. Even as it is however, precedent is relaxing its hold under the pressure of the newer social energy, as some of the following pages will show. The decisions of the past are not being overruled, in the proper sense; they have their place in the movement and are simply left in due course; they are not wrong — they are past. This, it is apprehended, is or should be the way of all precedent.

The new point of view, which is that law must be regarded as the resultant of conflicting social forces (less the conservatism of courts and legislatures), — a point of view long

hidden from sight in the faint stages of a social era of equality,—is reflected on many pages of this book as it now appears. A large part of Chapter I. (Theory and Doctrine) and the whole of Chapter VI. (Procuring Refusal to Contract) have been rewritten. It is enough in the Preface to point out that fact.

And this change in the way of looking at the law has been made the occasion also for a change in the principle of arranging the contents of the book. Heretofore the arrangement has proceeded from the positive pole of the law to the negative, closing accordingly with negligence. But I have been led in the course of time more and more to doubt whether this way of dealing with the subject is of any real benefit, with the result that I have finally abandoned it.

The principle now adopted is based upon the special state of mind which caused the conduct in question; that is, speaking broadly, whether the conduct was the effect of a Culpable Mind or an Inculpable Mind.

If the parts of the law of torts are distributable under two such heads, there is something to explain, and the division has a *raison d'être*. I have endeavored to justify the division and, briefly in the last section of Chapter I., to suggest the explanation of it.

M. M. B.

BOSTON UNIVERSITY LAW SCHOOL,
March 1, 1907.

P. S. The case of *Beekman v. Marsters*, to appear in 194 Mass., came to hand too late to receive the attention it deserves. It is noticed however in several places, and shortly stated on pp. 265, 266.

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THE LAW OF TORTS.

THE LAW OF TORTS.

CHAPTER I.

THEORY AND DOCTRINE OF TORT.

§ 1. LEGAL RIGHT.

THE sphere of action of a citizen, in his relation to the law, is found in his rights, privileges in the sense of permissions, and duties. What a citizen may lawfully do is Right, privilege, and duty. determined by his legal rights and privileges; what he must do is determined by his legal duties. These duties however correspond only to the rights and privileges of others; hence a man's rights and privileges, limited as they are by like rights and privileges in others, express the extent of his sphere of action as a citizen under municipal law. The cause of action for tort is based upon breach of duty, as is shown by the fact that the action *moritur cum persona*.¹ Defence however may be based upon right, such as right of property or of contract.

It is of first importance then to get a clear conception of the meaning in law of right, privilege, and duty, as these terms are to be understood. Legal rights are of two orders; those of the first or highest order are available ordinarily as a general ground of action or defence, those of the second order only as defence, or as a very limited ground of action. The term 'legal right' is however commonly used of rights of the first order, while rights of the second order are commonly called, or at any rate treated as, privilege in the sense of mere permission. That distinction will be followed in this book; the present

¹ Post, § 15.

section will deal with legal right accordingly, as of the first order, to be called the higher legal right, or full legal right, or simply legal right.

What is meant by 'legal right'?¹ The specific answer is, whatever, subject to the will of the State, the judge, or judge and jury, in a particular case may decide. As a matter of fact, most cases in the higher courts are cases in which the judges must decide the question of right. Such indeed is the complexity of human affairs that even 'natural' rights, so called, and rights already strictly defined, may be drawn in issue so as to raise a question which must wait upon the decision of the judge in regard to the law of it.

But it is important to know what governs the judge; for he is not permitted to decide a case arbitrarily. What then does, in fact, or at least in theory, influence and determine the decision in regard to the particular right? Some of the influences, it is plain, may be of a personal or a sub-legal nature, such as the judge's own views of political economy, politics, ethics, the pressure of public opinion,² or whatever else of the kind the case may suggest. Such things must always be taken into account. These however are usually (though not always) minor influences. A much greater power is found in particular economic movements of society as they gain ascendency in the State. The law is indeed conceived to be the resultant of the conflict of social forces in the State less the conservatism of courts and legislatures, — the dominant force as deflected by the conflict.³

¹ Several paragraphs are now taken in substance from Lecture III. in Centralization and the Law; that lecture being by the present writer.

² See Dicey, "Law and Public Opinion in England." According to Professor Dicey's admirable work, public opinion more or less *influences* the law. This differs from the resultant of the dominating force, spoken of infra, in that the latter, as here conceived, *makes* the law, or should make it if order is to be maintained in the State. The will of the State, in other words, is found, more or less perfectly exercised, in the dominant social energy, if there be such. That, as far as possible, will fix standards of conduct in the State.

³ It is the *movement* of the law into new fields, or its return to old ones, that this doctrine of the law as the resultant of conflicting forces primarily applies to; in other words, the doctrine refers chiefly to the propulsive

The dominating force in society may be equality of dealing and of access to the opportunities of life, as (apart from slavery and the position of the dependent classes) it was in America until in recent times ; it may be inequality, hereafter ; it may be some more special force, as has been the case in English history, and may be the case hereafter in America. Bearing in mind this conflict of forces and their resultant, and remembering the personal factor in the judge, what determines the judge, or is supposed to determine him, in deciding the point of right is found in a general conception which may be put thus :

Legal right is what the State, acting through conflicting social forces, wills in favor of its subjects. As the term has been understood under dominant conditions of equality, that is, as the courts under such conditions appear, in theory, to have taken it, it is based on the idea that, subject to existing rules of law and procedure, to the personal factor in the judge, and to the will of the State, which alone has absolute rights, men should be free to live and to have, and to carry out their reasonable purposes in any reasonable way they will, or shortly, on the idea of freedom to do whatever is reasonable. And taking the word 'reasonable' as meaning what the State, in the conflict of forces, can and will maintain in favor of its subjects, which must be its meaning in law, the same idea of legal right must hold in case inequality (or any other force) becomes dominant in the State. The difference between the two will be found only in the application of the idea of freedom to concrete cases ; freedom to do what is reasonable must obviously have narrower play under inequality than under equality, but that is all. In either case, on the idea of energy of the law, wherever change in the law takes place. Then the working out of details follows, upon the ordinary process of reasoning, which, though on the lines of this dominant social energy, will not differ materially in other respects from what would have been the case had no social change taken place. Indeed a particular social era, like that of equality in our own history, may last so long and be so taken for granted as to cause the underlying social factor to be lost sight of altogether. One must stand, as we are standing now, at the crisis of a great social change in order properly to gauge the movement and its effect.

freedom to do whatever is reasonable rests, in theory, the whole law of rights, 'natural,' judicial, and legislative; 'in theory,' but the practice has not always agreed with theory, for the law contains many anomalies, the survivals of spent forces in society, which are still more or less in operation, and these survivals, or anomalies, restrict freedom as it would not otherwise be restricted.¹

The dominant force in society differing at different times, it follows that the law of one period should not be taken as the guide for another, except in so far as, notwithstanding the change, the conditions of society remain for the particular purpose the same, or except in so far as the change may not have affected particular branches of the law. The subject of torts is largely, but not entirely, an example of the exception. The dominant force in society, whatever it may be, has, and probably will have, no quarrel in general with the law of torts, as a law of damages, as it has been laid down in the past to our own day. The law of this subject appears to be suited to most conditions and changes; not necessarily, but as a matter of indifference, as not worth the trouble of making over.² The result is that in dealing with the law of torts we need not, apart from the newer phases of combination, much concern ourselves with social changes, however great. Nothing short of a general upheaval and reconstruction of the law from the foundation is likely to disturb, in any substantial way, the present structure which we call the law of torts, as a law of damages.

As a matter of fact, the greater part, in point of bulk, of the American law of torts, was worked out during the nineteenth century under conditions of practical equality, so far as the

¹ On that subject, see Lecture IV., of Centralization and the Law. The Benthamites fell into deadlock in regard to freedom. They held that a man should be permitted to do whatever he pleased if he did not violate the law. But to enter into contract, especially in combination, is so far to give up freedom. The word 'reasonable,' adopted by the courts, avoids the deadlock.

² And so it is not a matter of abstract principles or principles which are *per se* of an eternal nature. The limitations of logic, though important, are probably less in the law of torts than in most other branches of the law.

white race was concerned. What the law would have been had inequality (in the North as well as in the South) or some other antagonistic social order prevailed, no one can tell; but it is probable that it would have differed materially from what it is, a hint whereof is given by the law in regard to the negro race in the Southern States of the Union under slavery. And indeed the only considerable part of the law of torts which to-day is unstable is that which relates to combinations tending to inequality, the subject, that is to say, of the contest going on between capital and labor and between the public and each of these. Not until the social centre of gravity on these subjects becomes fixed will the law become stable; tendency is all that at present can be seen.

We fall back now to the question, what is 'reasonable' as the word is used above.

This must often turn on reasoning, wherein men may and will differ, lawgivers as well as other men. This is true even of rights sometimes called absolute, rights of life, ^{what is 'rea-}liberty, and property. For, after all, complex ele-_{sonable.'}ments constantly enter into the composition of what at first appears simple enough. When may life be taken, if at all? When, in a complex case, is a man wrongfully imprisoned? What of the legal right between two men in trade, where in a particular set of facts one of them finds that he has been deceived? In a certain peculiar case has another trespassed upon my land? Learned counsel may answer these questions one way, while the judge answers them another, both answering on defensible lines of reasoning.

It is plain then that the validity of reasoning cannot be the test of legal rights in such cases, for when men may well differ, how shall the real validity of the reasoning be determined? But there must be an end of question,— *interest reipublicæ ut litium finis sit*,— and hence the decision of the competent authority must be accepted and settle, so long as it stands, the question of right. In other words, the question of legal right, when a matter of reasoning at least, is, as we have already said, what the lawgiver declares.

That is somewhat indefinite, and alone would leave the question much at large. But the lawgiver has been constantly employed in deciding questions of legal right, and in so doing has found a way of providing, and has provided, a body of law, consisting of doctrines and rules growing out of the general postulate of freedom to do what is reasonable, which are calculated, more or less, to aid in solving questions of right under the present order of things.

These doctrines and rules make the first limitation upon freedom to do what is reasonable. So far freedom is hedged about and its meaning narrowed. The limitation itself may or may not rest upon a good foundation; but in any case the field of doubt is narrowed, so long as the limitation holds. Under the pressure of sound theory, which should shift the centre of gravity from mere precedent to custom and the pursuits of men generally under a change of social forces, rules not adapted to the times should be constantly passing away—‘constantly,’ for the process must always be going on; still while they live they play their part in the determination of legal rights. Most of the settled rules of law, however, stand upon firm ground and so have properly narrowed the field.

The laws relating to tort furnish examples of both kinds of limitation. But whether of the one kind or the other, they afford great help in determining a question of particular legal rights. The *law* may not decide a given case, for the other limitations, procedure, and the personal factor, must be reckoned with, and the case may further be complex and require reasoning beyond authority, where men may differ; but it will be found, nevertheless, that the law has much hedged about the difficulties and will go a long way towards settling the specific question. Still it must be said that, even with the help of the most definite rules of law, legal right, when brought in question before the courts, means, in all but the simplest cases, what the judge (or it may be the judge and a jury) decides.

A general and fundamental limitation of right by law is found in the objects over which the right can extend. The

general right ‘to have’ imports, legally speaking, that the object of the particular right is within the control or the authority of the will. Indeed, so far as the question Limitations of right. of the existence of the particular right is concerned,

control or authority enters into the very constitution of the idea, as limited by law. Apart from cases of right of the lower order, I have no legal right to or over objects beyond my control or authority. Thus I have no legal right to or over light and air beyond me, in the general atmosphere. I have no legal right to the free fish in a stream, though the stream run through my land.

An object is within the control of my will, within the meaning of the foregoing paragraph, when I can exercise control over it. The object may or may not be in my hands or within my reach; enough that there is nothing to prevent my exercising control over it, so far as any interference by others is concerned. I have a contract for the purchase, and conveyance at a future time, of a house; the house is not mine yet, but no one can interfere with my right to become the owner of it according to the contract,—*that* is within my control. So far the house is within the control of my will; so far I have a legal right over it. I have seed in the ground, from which a crop is likely to grow; I have control of seed and expected crop, if no one is preventing my exercise of it.

An object is within the authority, as distinguished from the control, of my will when I am wrongfully deprived, in whole or in part, of my control over it, without losing title to it, as, for example, when my horse is stolen or otherwise wrongfully taken or withheld from my proper control.

So of the means by which I aim to exercise or obtain a legal right. The means must be commensurate with the end; and I have a legal right to use such means, whether within the control or only the authority of my will. But if the means be beyond my control or authority, I can, of course, have no legal right over them and the end desired must as well be in suspense accordingly.

The second limitation upon freedom to do what is reasonable is found in procedure. Rights must always be subject to

such modes of procedure as are provided for the administration of justice. As a matter of fact, this, until in quite recent times, has been, and to some extent still is, true beyond what might well be considered reasonable requirement. Historically speaking, and the historical side of the matter still lingers, procedure has been treated practically as if that were the principal matter, and rights have had to take second place, reversing the true order and handicapping justice.

The handling by the courts of the famous statute of Westminster 2, ch. 24, affords a striking example. Intended to ameliorate rules of procedure, the statute was frittered away by endless refinements, until matters became worse, if possible, than they were before; rights were sacrificed every day to the supposed requirements of procedure.

But rules and theories of procedure have undergone much change in recent times, and it is now true in the main that men are free to do what is reasonable, subject to rules of procedure operating only as a necessary narrowing of the field of legal right. It must not, however, be overlooked that these rules may, themselves, require interpretation; and so once more what constitutes legal right is for the judge to decide.

A third limitation is found in the rules of evidence.

The fourth and last limitation is the personal factor, by which is meant the personal limitations of the judge himself, or of judge and jury,—the bias of the judge, any lack of knowledge or sound judgment on his part, his views of the law, politics, political economy, ethics, public opinion, or other matter. This limitation need not be dwelt upon; it must be an obvious factor in determining questions of right by the courts.

It is fair inference that the decision may miscarry, and this too though no sound objection could be made to the rule or rules of law by which the case may, so far, be determined; still the decision, while it stands, is, and must in the nature of things be, an answer to the question of the particular legal right. The distinction then should be clearly noticed between the general postulate of legal rights, together with the rules of law growing out of it, and the determination of the question,

by the lawgiver, of a particular right. It is no ground of impeaching the former that the latter has miscarried.

In the ordinary transactions of men the limitations above considered may have little influence. Men assume, and justly assume, that they have legal rights, though few of these may have been specifically determined by law, and act accordingly. This is confidence, without which the affairs of men could not be carried on. Fortunately but the smallest part of the daily transactions of the world ever calls for any legal determination of the matter of right. Indeed in ninety-nine out of a hundred cases, in the ordinary affairs of life, men know what is meant by freedom to live and to have and to carry out reasonable purposes in reasonable ways. The hundredth case requires the legal counsellor and administrator, and possibly the decision of the judge.

As we have already seen, legal right of the higher order usually furnishes ground upon which one may bring an action against another. It is not always so; sometimes the right is available only in some peculiar way,— it may not afford a ground of action at all, since that might not serve the purpose. Thus a man put on trial upon a charge of crime acquires thereby a right to have the prosecution carried forward to a verdict, in the hope, of course, of an acquittal, to clear his good name. Infringement would not, unless it were a case of malicious prosecution, give him a cause of action. But the right to have the prosecution carried through is as truly a legal right as any other; for if it is violated, the accused will be entitled by law to an acquittal.¹ Such cases, however, are exceptional, and for the purposes of this book need only to be mentioned.

It is a corollary of legal right that, among legal rights of the *first* order, all rights are equal. One right of the kind is as good as another; by the very terms of it any such right will sustain an action or a defence. It

Legal right not
always a
ground of
action.

¹ Commonwealth *v.* Tuck, 20 Pick. 356, 365.

is not necessary or accurate therefore to say, as sometimes is said,¹ that when a man sues on a stated claim of right, he must be answered, assuming the claim to be true and existing, by a ‘superior’ right. If a man sue upon such a right, he must prevail, upon proof that the defendant has infringed that right. If, on the other hand, it appears that his claim is answered by full right, that is enough, — the plaintiff’s right has not been infringed, not because the defendant’s right is superior, but because it is equal to the plaintiff’s. The plaintiff has not proved his case. Legal right, in one and the same sense, may be shown by plaintiff and defendant alike.

It is necessary now to inquire what rights are within the domain of the law of torts.

Rights are either of substantive or of procedural law. With procedural rights we are not concerned; this book treats only of substantive law, not of the machinery by which the law is enforced. Rights of substantive law are within the law of torts.

law (and indeed of procedural law, but not on the same lines) in accordance with a division and nomenclature adopted from the Roman law, are in rem or in personam. Rights in rem avail against all the world; rights in personam only against certain defined or ascertainable persons. The typical example of a right in rem is a right of property; such a right may be enforced against any one and every one whenever occasion arises. The typical example of a right in personam is a right of contract; such a right can be enforced only between the parties to it and their successors. But just as one has the right to enter into contracts freely, so after a contract has been made each of the parties has a corresponding right that others shall not hinder the performance of it without just cause or excuse. It results that a right in personam *may* generate a (quasi?) right in rem. But the product, it should be noticed, is a very different thing from that which produces it.

¹ *Walker v. Cronin*, 107 Mass. 555, 564; *Read v. Friendly Society of Stonemasons*, 1902, 2 K. B. 88, 96.

The law of torts relates both to rights in rem and to rights in personam, though most torts are breaches of rights availing against all the world, that is, are breaches of rights in rem.

Another way of putting the Roman division of rights will be found helpful, as serving to explain the origin as well as the nature of rights; and that is by saying that rights are paramount or consensual; the first kind designating those which exist independently of the will of individuals; the second, those which come into existence by consent, actual or presumptive. Both kinds of right are paramount in a sense; but the one kind exists originally and of its own efficacy and is universal, while the other is brought into existence, typically speaking, by the agreement of two or more persons, and, generally speaking, governs them alone. Still, even with regard to the latter kind of rights, the judges have found it desirable to hold that the relations of the parties to the thing agreed upon are not in all respects consensual, in the sense that there can be no right or duty paramount to the will of the parties in the subject of agreement, a matter to which further attention will be called later on. The law of torts deals with both classes of rights; with the first class generally, with the second so far as the rights are treated as paramount to the will of the parties. In a word, the domain of the law of torts, so far as rights are concerned, lies in rights paramount, and hence tort, as a ground of action, consists in the breach of rights paramount, that is, of rights established by municipal law, as distinguished from rights created only by consent between two or more persons.

§ 2. LEGAL PRIVILEGE OR PERMISSIVE LEGAL RIGHT.

Within the domain of torts fall also those legal rights of the second order already spoken of as privilege in the sense of mere permission; the rules for determining which are the subject of the present section. Privilege may indeed include the higher legal right, as where it consists in special powers granted by law, of which riparian water privileges would be an example, or where it

Privilege as
right and as
permission.

is absolute, of which exemption of a member of the Legislature from liability for words spoken in that capacity would be an example. In that sense it has been disposed of. But the term is also used, as we have already indicated, of mere permissions. In this sense it falls short of full legal right; towards the person granting it it is now purely negative in character; it does not furnish ground for an action against him. It imports protection, but protection only from an action by the party who has conferred it. Towards third persons it may indeed confer a right of action, as in the case of a license to enter land, where entry is interrupted by a stranger,¹ or in the case of a gratuity, such as gratuitous entertainment.² Indeed this matter of the lower order of right rises in gradation until it reaches and culminates in the legal rights of a disseisor, available in many ways against all the world except the one person who has been disseised. But we are not now concerned with the term under consideration in any of its aspects of right as a ground of action.

The conception of privilege thus set forth embraces permission of two kinds: first, permission 'by the party,' that is, by some person granting it; and, secondly, privilege. permission 'by the law,' or permission paramount, since it is independent of the will of the person against whom it is granted. In either of these cases the privilege may or may not amount to the higher legal right, as the examples already given show.

In the law books privilege in both senses is found under various designations. In the law of defamation it is called 'privileged communication'; in the law of trespass to property it is called 'license'; and so on. Often the word 'justification,' taken from the language of pleading, is used as a general, synonymous designation of the idea.³

It is important to understand the ground upon which privi-

¹ *Barnstable v. Thacher*, 3 Met. 239.

² *Williams v. Hill*, 19 Wend. 305; *Moore v. Meagher*, 1 Taunt. 39.

³ 'Justification' may be of legal right, as in the case of self-defence or defence of property, or it may be of mere permission.

lege as permission rests, but nothing more than the general ground itself can be stated here. Privilege as mere permission must, of course, rest on terms; otherwise it would be 'absolute'; thus amounting to full legal right. It is in effect, if not in terms, conditional on being acted upon in good faith. Permission (short of full legal right) would not otherwise be given; in other words, mere permission turns upon the motive or the intent of the person obtaining it,—he has no permission except as his motive is rightful and his purpose in accord with the permission. The significance of this restriction between legal right and conditional legal right will appear later.

Ground of
privilege as
permission.

Upon what more particular ground privilege rests in special cases, or in any special classes of torts, can only be shown when the special subject arises in the 'Specific Torts' following this chapter. The first class of cases of privilege, 'by the party,' calls for little comment here. The ground of the permitted party's exemption is consent, which is often expressed by a maxim adopted from the Roman law, 'volenti non fit injuria,'—the man who consents to what otherwise would be a wrong ('injuria') is barred of an action for it.¹ Privilege 'by the law,' or privilege paramount, finds its origin either in duty or in interest,² and is, of course, limited accordingly.

It will be necessary presently to speak of legal duty broadly, as the converse of legal right in general. Here it should be spoken of in relation to privilege. Duty as a ground of privilege may be official or quasi-official, or only moral, that is, of imperfect obligation. It requires no explanation to show that one must be protected from the necessary consequences, however harmful, of discharging a duty which one is expected to perform. A policeman making report to his superior, an officer serving process,

Legal duty in
regard to privi-
lege. .

¹ Post, § 6.

² Hebditch *v.* MacIlwaine, 1894, 2 Q. B. 54, C. A.; Harrison *v.* Bush, 5 El. & B. 344; Jenoure *v.* Delmège, 1891, A. C. 73 (Privy Council); Gassett *v.* Gilbert, 6 Gray, 94; Joannes *v.* Bennett, 5 Allen, 169.

a fireman endeavoring to put out a fire, must be exempt from liability for everything done in the discharge of his duty. The law could not be administered upon any other footing in the first and second of these cases; and, in the third, it would be difficult to find firemen to protect our homes if the law were otherwise than it is.

That privilege may also arise from moral duty is not so obvious; still the fact rests in principle as well as upon ^{Moral duty in} authority. The case springs in essence from an ^{regard to privi-} instinctive desire for the preservation of the race, a ^{lege.}

desire akin to that of self-preservation and equally well-founded. It is not directly necessary to put the case upon the ground of political prudence, which sees in it the welfare of the State, though that plainly is a consequence of the first ground. I may well enter my neighbor's premises to rescue his beast from the mire; much more may I enter to save human life; to hold me responsible for harm done in the reasonable discharge of such a duty would be to find the existence of a relation between my neighbor and me which would tend to anything but to bind us together in the organism of the State. Where moral (or indeed official) duty shades into pure voluntaryism, becoming impertinence, may often be a difficult question; but such considerations cannot avail against the existence of the immunity.

When it is said that privilege may grow out of interest, the word 'interest' must be taken in the sense, it seems, of legal right, either in the higher or the lower conception ^{Interest in re-} of the term. I may have a duty towards my ^{gard to privi-} neighbor as my neighbor, from an instinct of humanity; but I have no interest in him simply as my neighbor, except perhaps the shadowy interest in his welfare as one of the multitude of men composing the State, and so sharing with me its burdens. The interest required must, at all events, rise higher than desire or even anxiety for another's general welfare.¹

¹ See *Sheckell v. Jackson*, 10 *Cush.* 25.

**§ 3. RIGHT IN DEFENCE, HOW DEFEATED: ABSENCE
OF SUCH RIGHT.**

Assuming now that A has a particular legal right which B has invaded by conduct *prima facie* wrongful, it is plain that A is entitled to maintain an action against B unless it appears that B's conduct, though *prima facie* wrongful, was in reality rightful, and it is equally plain that to be rightful it must have been of legal right, either in the higher or the lower sense of that term,¹ for, of course, no right except such as the law will recognize as a defence, in other words nothing but a legal right, will be of any avail to B.

It is plain that if I have exercised my legal right by wrongful means, — acts or words, — though not in themselves torts, I have usually no defence.² To say that I had *wrongful means*. a defence would be a contradiction in terms and inconsistent with the idea of legal right as freedom to do what is reasonable. A legally wrongful thing could not be a legally reasonable thing. Now the lawgiver has furnished a category of things amounting to wrongful means, some of which may here be named by way of suggesting the nature of such means: Fraud in general, false representation, intimidation, threats of bodily or other harm, or duress; not to mention acts which of themselves would be torts and not (as are those just named) merely constituents of tort.³ But intimidation and threats of harm are also expressions of malice, and may be dealt with properly under that head.

The term 'fraud' may for the present be shortly disposed of. The wrong consists of two sorts of cases; one in which the

¹ *Ante*, p. 3.

² See qualification, p. 29.

³ Of course, if the means in themselves constituted torts, it would not be necessary to go further to find liability. To make a question, it must be understood that negligence, wrongful means, and malice are not of themselves actionable, but only constituents of a right of action, to be helped out by other facts.

person committing it is now dealing or communicating with the person upon whom it is committed, the other in which he ~~Fraud and its~~ is not. In the first of these cases the person ~~de-~~ division. ~~frauded~~ is induced by the misrepresentations or like acts of the wrongdoer to change his position to his hurt, by entering into new relations with the wrongdoer himself or with some one else. Here the two, the one harmed and the wrongdoer, are face to face, personally or by agent, and the wrongdoer holds out some deceptive inducement which is acted upon by the other. In the other cases of fraud, the wrongdoer is seeking through some third person to circumvent the party to be wronged from enforcing his rights against him. The wrongdoer is putting his property out of his hands, for instance, to defeat the rights of his creditors. The first of the cases then is deception, the second circumvention only.

The first of the two, deception, leads to an action for damages; the second does not in ordinary cases. The first alone is a tort in that sense; with the second we are no further concerned. Fraud in the sense in which we are concerned with the term is one of the elements of a specific tort called deceit; in relation to which it has a definite, settled meaning. What that is will appear in the chapter relating to that subject.

One more remark concerning fraud should here be made. The word, even in relation to deceit, is used in two senses, a broader sense in which it is here used, as denoting the means by which a lawful act is made unlawful,—the whole artifice by which the result is accomplished; and a narrower sense of intent,—the ‘fraudulent intent’ of the books. In this latter sense, when the intent is inspired by an evil motive, fraud differs little, if at all, from malice as motive. The same evidence will suffice to prove either.

Deceit will be the only example of wrongful means specially dealt with in this book.

It is also plain doctrine that if one's conduct violates common standards of care, skill, or diligence, this will Negligence. destroy what otherwise might be a defence of legal

right. I have a legal right to drive in my carriage, I have a legal right to send my produce to market in my market wagon ; but if I drive my carriage without reasonable care, skill, or diligence, whereby I am brought into collision with another who is acting reasonably, or if my servant similarly drives the market wagon with like result,—in these and a thousand other cases of the kind my legal right will avail me nothing in an action by the person who has suffered harm. I have been guilty of negligence.

It should be made clear at the outset that negligence is a state of mind ; a fact obscured by the circumstance that stated external standards are applied to the proof of it. But ability to meet the standards is an essential condition to compliance with them, and mentality is essential to ability. Hence the real question in negligence, as well as in all other cases, is of the power and action of the mind. This of course can be proved only by manifestation. Negligence consists in a passive state of mind — it may be in a refusal to assume an active state—towards danger ; this may however appear even in acts,¹ provided that these acts, in order to liability, are followed by harm as a mere event and not as an intended result.

Now let it be supposed that no wrongful means were employed, and that the general standards of care, skill, and diligence were observed,— that all conduct of the *Intention and motive.* kind was legally rightful ; it will still remain to consider whether one's intention or motives, or both together, when morally culpable, may affect one's defence of legal right. In a word the question is, of the place of malice in the law of torts. This question may be one of reasoning — logic — or one of social determination. In the first aspect to consider

¹ ‘Act’ in the proper sense, and as generally understood in the law, is a thing done or word spoken as the effect of psychic or mental process, that is to say, in consciousness — of purpose — as distinguished from mere reflex or automatic action, such as movement in sleep. Hence to speak of an ‘intended act’ is a pleonasm ; an act is necessarily intended, though its consequences may or may not be intended. See Ziehen, *Physiological Psychology*, 29 (London, 1892).

the matter of intent: B intended to inflict the harm of which A complains, — that is, A says that, notwithstanding the fact that B had apparently a legal right to do or omit what he did, B is liable to him because he brought on the harm intentionally; the intent to inflict the harm destroyed his right.

The distinction between intent and motive should not be overlooked.¹ The intent is, purpose or object in the concrete — the stretching out (such is the figure) of the mind towards the end desired; while the motive is that which inspires and causes that stretching out. Now the intent may be morally culpable, while the motive is good enough; the intent may be to inflict harm, while the motive is one of benefiting another, or one of ordinary self-interest. The motive, if not the highest, would not, in either case, be generally considered legally culpable.²

Two questions may then arise: first, can the intent to harm, where the motive is good, destroy B's defence of legal right; if not, can B's intent, when inspired wholly by a bad motive, such as hatred of A, have that effect? Theoretically a third question might arise, to wit, can the intent to harm, where no motive good or bad appears, affect the defence? But this third question is the same in effect as the second, since when no motive is shown for causing intended harm, the case, in point of civil liability, — in tort, — is treated as the equivalent of one arising from a bad motive.³ It is doing the harm recklessly, and that, in the law of torts, is equivalent to malice in the ordinary sense of an evil motive. The point will be referred to again.

The first question, whether intent to harm, where the motive is good, will destroy the defence of legal right, is answered in the negative both in this country and in England.⁴ This probably is true, though in addition to the

¹ See *South Wales Miners' Fed. v. Glamorgan Coal Co.*, 1905, A. C. 239, 252, Lord James.

² Lord James, in case just cited.

³ *Pasley v. Freeman*, 3 T. R. 51, Ashurst, J.

⁴ Of course, the absence of legal right in the defendant's conduct makes a different sort of case, as in *South Wales Miners' Fed. v. Glamorgan Coal Co.*, 1905, A. C. 239, 252.

proper motive, such as a desire to promote one's welfare, there is also an intent to harm another out of ill-will, and not merely as a means of promoting one's welfare. Clearly B is not liable where his intent to harm A is only with a view to promoting his own (B's) interests. That is a very common case of competition between rivals in business.¹ B has a legal right to promote his own welfare, if he use no wrongful means, though he intends to drive his rival to the wall. His motive being lawful, his legal right, speaking by logic, is not lost by his intent. Such is the common law; but one should not fail to notice that this reasoning leads to a justification of monopoly, for competition which drives the rest of the world out of the field becomes monopoly. Social forces are arraying each other on the one side or the other of this point; with what result cannot yet be seen.²

The second question, whether intent to harm where the motive is bad will destroy one's defence of legal right, has been found more difficult. Certain courts hold that the answer should be in the affirmative,—that the law should go no further than to protect a man when his motive is just, and not where, though in the exercise of a legal right, he intends to do harm to another and does it.³ This view does not rest on logic for its validity. But many courts have been accustomed to declare that it makes no difference that the motive as well as the intent is bad,—enough that what was done was done in the exercise of a legal right. In other words, and in common language, malice in the worst sense will not overturn (full) legal right.⁴ Such is the view resulting from logic.

¹ *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25.

² Hence the law must meantime be unstable. *Ante*, p. 7.

³ *Sweet v. Cutts*, 50 N. H. 439; *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Graham v. St. Charles R. Co.*, 27 L. R. A. 416 (Louisiana, modern Roman law).

⁴ *Plant v. Woods*, 176 Mass. 492; *May v. Wood*, 172 Mass. 11; *Rice v. Albee*, 164 Mass. 88; *Frazier v. Brown*, 12 Ohio St. 294; *Payne v. Western R. Co.*, 81 Tenn. 507; *Paine v. Chandler*, 134 N. Y. 385, 390; *Boyson v. Thorn*, 98 Calif. 578; *Quinn v. Leathem*, 1901, A. C. 495; *Allen v. Flood*, 1898, A. C. 1; *Bradford v. Pickles*, 1895, A. C. 587; *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25; and other cases cited post, p. 30.

Which of the two conflicting rules is correct? It may be urged that the question is one of morals in the sense of ethics. If that be true, it is plain that B is liable — his legal right is overturned by his bad motive. Is the moral or ethical view the one followed in law?

Undoubtedly the moral and the legal view agree in most cases; but that is because the moral conforms to the legal view as the dominating purpose of society, rather than that the legal is made to conform to the moral view as an object of the law. The law does not profess to enforce morals as such. The law is the resultant of social forces working in the State, which resultant may very well conform to moral standards; but where the social resultant falls below the moral standard, the case is a matter for the ethical and the religious teacher rather than for municipal law. A higher moral impulse, becoming dominant, or the more common and gradual influence of public opinion, may raise the legal standard.

What then is the controlling idea as manifested in the social standard or predominating energy of the present time? Is it not that the weaker may be pushed to the wall? And if this is not done by the coarser methods of brutality or deception, or by malicious combination, is not the current legal standard in agreement with the social? Some recent cases would leave no doubt.¹ This may import a low standard of ethics, but if the law is to be better from a moral point of view, the dominating power must first become better. Exceptionally some strong lawgiver may lift a small part of the law above the common level; but generally the law, with more or less lagging, will correctly represent the prevailing social standards, changing only as those standards change.

The social energy may indeed differ at different times; to-day capital may dominate society, to-morrow labor, the next day morals, or religion, as in the seventeenth and eighteenth

¹ *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25; *Rice v. Albee*, 164 Mass. 88; and other cases in the last note.

centuries was the case under the New England theocracy ;¹ or there may be such an even-handed struggle that nothing is settled, and the law vacillates in uncertainty so far as it relates to such conditions. But when energy in any one direction predominates and makes good its hold upon the State, the legal result will in great degree correspond. The law, reckoning energy with legal conservatism, is on the whole the servant of the dominating social energy ;² and malice accordingly may at any time be held enough to overcome the ‘legal right’ of common-law doctrine and so to declare that that which reasoning would fix upon as legal right is not legal right at all.³

There is reason to believe that common and gradual influences, as distinguished from the more energetic movement of social forces, are already at work towards that end. The dry logical formula is at any rate becoming seriously narrowed in some States, without the help of legislation. A striking illustration may be seen in the many recent cases which have repudiated the rule laid down in the first half of the nineteenth century, that a man may, if he will, exercise his rights of ownership of property, at any rate of land, in a spirit of spite and malice towards his neighbor whatever the consequences may be.⁴ The old rule still obtains in certain States ; but the current is setting the other way.⁵

¹ *Centralization and the Law*, 6, 12, 23, 45–47, 63, 64, 150, 151.

² This dominant social energy, under the New England theocracy, was not much troubled with nice questions of the remedy ; it made use of transportation, injunction, mandamus, or whatever else suited the purpose. It is a perfect illustration of law as the expression of the prevailing social energy, in that case in full power.

³ What would happen if socialism or perhaps labor unionism should gain ascendancy might easily be predicted.

⁴ *Chasemore v. Richards*, 7 H. L. Cas. 349, 388 ; *Rawstron v. Taylor*, 11 Ex. 369, 378 ; *Chatfield v. Wilson*, 28 Vt. 49 ; *Frazier v. Brown*, 12 Ohio St. 294. See also *Chase v. Silverstone*, 62 Maine, 175, 183. Was this rule an expression by the courts of the doctrine of the English utilitarians, Bentham, J. S. Mill, and others, who found the measure of conduct, not in motive which inspires the will, but in the outward expression of the will ? The external standard doctrine, so powerfully expounded by Holmes, appears to be essentially the same thing.

⁵ *Pence v. Carney*, 52 S. E. Rep. 702 (W. Va.) ; *Forbell v. New York*, 164 N. Y. 522, 58 N. E. Rep. 644 ; *Wheatley v. Baugh*, 25 Penn. St. 528,

Modern phases of conspiracy should be noticed in the same connection. Passing by the criminal side of the subject as not within the scope of the present inquiry, one can-
~~Conspiracy.~~ not fail to notice that we are in the way of a new tort, if we have not indeed already reached the point; a tort founded, contrary to former ideas, upon conspiracy as motive as well as intent. Recent cases indicate that the courts will not allow the formula of legal right to stand in the way of an action for damage due to conspiracy. That is to say, the courts are becoming accustomed to the idea that it should not follow that, because in certain cases one person may of legal right do an act to the damage intentionally of another, several persons may combine, with a malicious purpose, to inflict damage.¹

In all this discussion however the distinction, it should be repeated, between intention, or what one *wills* to do, and mo-
~~Intent and~~ tive, or what inspires the will, must be kept in
~~motive.~~ mind. Unlawful intention will always overturn what otherwise would be of full legal right, whatever may be true of evil motive.

So much for full common-law legal right. Unfolding further the general idea of right, we have now to consider privilege as mere permissive legal right. The question whether such right as a defence is affected by intent or motive is much simpler than the other. The answer indeed is found in the very terms of the permission. The permission, as has already been seen, is granted on the terms, express or implied, that it shall be acted upon in

Permissive legal right and malice. 533; Bassett *v.* Salisbury Manuf. Co., 43 N. H. 569; Swett *v.* Cutts, 50 N. H. 439; Katz *v.* Walkinshaw, 141 Calif. 116, 70 Pac. Rep. 663, and 99 Am. St. Rep. 66; Barclay *v.* Abraham, 121 Iowa, 619, 96 N. W. Rep. 1080, 64 L. R. A. 255, and 100 Am. St. Rep. 365; St. Amand *v.* Lehman, 120 Ga. 253, 47 S. E. Rep. 949. See also Greenleaf *v.* Francis, 18 Pick. 117; Roath *v.* Driscoll, 20 Conn. 533, 543; Graham *v.* St. Charles R. Co., 27 L. R. A. 416 (Louisiana); Michigan Law Review, May, 1906, pp. 541-543.

¹ Plant *v.* Woods, 176 Mass. 492; Berry *v.* Donovan, 188 Mass. 353; Quinn *v.* Leathem, 1901, A. C. 495.

good faith,—that the motive shall be the one supposed. A gives B license to enter upon A's land, or invites B to accept hospitality at A's house, or extends some other favor of the kind, in derogation of his own rights. B accepts, or is assumed to accept, the favor in the way it is given; his motive in accepting it is, or is assumed to be, in accord with A's kindly act,—his intent, to act upon the favor in good faith. If then his motive be inconsistent with what A understands it to be,—if it be a bad motive, a malicious motive,—or if, while the motive may be said to be good, as where it is merely self-interest, the intent still is bad (as when B is endeavoring to get some advantage over A which A would not grant), in either case the terms on which the favor is granted have not been complied with, and B has no standing in law against A. The license, the right of hospitality, or like favor, never took effect; B is a trespasser.

When therefore it is said, as sometimes it has been, that an evil motive (malice) will not affect an act which otherwise is lawful, the word 'lawful' must be understood in the sense that the act in question was one of full legal right.

Malice as an evil motive, or the like, has accordingly a proper and necessary place, even in the present law of torts. This fact has not always been understood, or, when admitted, its significance has not been fully appreciated.

The term is used in the books in different and confusing senses, which accounts for much of the misunderstanding in regard to the place of malice in the law, especially in the law of torts. An explanation of the various uses of the term should be made.

The term has been used, and still is occasionally used in the law of torts and elsewhere, in at least four different senses. It is used to signify, (1) an evil motive, as in ordinary speech; (2) reckless conduct, or wanton or heedless disregard of consequences where there is or should be knowledge that mischief will follow; (3) in the case of false statement in general or by suit, that this was made with knowledge of falsity; (4) nothing more than knowledge or notice of the existence of some

Use of term
'malice' in the
law.

special relation which accordingly the person said to be guilty of the 'malice' interrupts.

A remark has already been made on the second of these meanings of the term; in the law of torts, to do a harmful act with reckless or wanton disregard of the consequences, or heedless of them when they are present to the mind, is considered as satisfying the purpose of malice equally with doing the act under an evil motive.¹ And there is some ground for saying that such a matter amounts in most cases practically to the same thing as malice in the ordinary sense. A man can hardly be said to have no motive at all when doing an act in reckless, wanton, or heedless disregard of another's rights; if he has so done the act, he has done it under the idea — motive — that it may afford pleasure to him or some one else, or because he cares not for any harm that may follow, and in either case there is usually something closely akin to an evil motive in his conduct. Acts done in such a spirit might well be considered to destroy any permissive right to do them.

It is not always true, however, that to do an act in reckless, wanton, or heedless disregard of another's rights is to do it with an evil motive. To prosecute a man with knowledge that there is no just cause of prosecution would afford an example. This might be done in a reckless, wanton, or heedless spirit, with what is commonly regarded as a good motive; it might so be done with the motive of gaining a reward. A man again might tell a falsehood with the sole motive of helping a friend, indeed with regret that harm to any one should follow. It is clear that such cases satisfy any requirement in law of proof of what is called malice in fact. The result, so far, is that the conception of malice as evil motive does not quite meet the legal idea of the term. 'Malevolence' has been suggested,² though that too falls a little short. On the whole, it appears to be enough to say that, for the purpose

¹ *Gott v. Pulsifer*, 122 Mass. 235; *Wren v. Weild*, L. R. 4 Q. B. 734, 736; *Allen v. Flood*, 1898, A. C. 1. It is a curious instance of the likeness of things different that recklessness, wantonness, and the like are also considered sufficient to satisfy an allegation of negligence.

² *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. Rep. 125, Holmes, C. J.

of overturning permission, the term 'malice' may properly be used in any of the three senses above given.

Malice, in the fourth sense, is a different thing altogether. To make B liable for interrupting a certain relation between A and C, as for instance that of master and servant, it is necessary to prove that B knew of the existence of the relation. Then, with such knowledge, interrupting the relation, it has been usual in the past to say that he did it 'maliciously.' It is plain however that that may not have been the case in the sense either that he did it with an evil motive or in reckless, wanton, or heedless disregard of rights. It is plain that malice in the fourth sense is quite emptied of its natural meaning, and that to use the word in that sense is confusing and misleading. Accordingly it is now considered by careful judges that the custom of calling such a case malice should be dropped,—in other words, it is now held that to procure a breach of contract relation is actionable without proving malice.¹ Proving knowledge of the relation is simply proving the existence of a legal duty,—that is, knowledge of danger to the plaintiff's rights.

It has been noted above that malice (as motive or the like) has in regard to some cases been thought to be an exception to general doctrines of law, in that in regard to those cases it is supposed to overturn legal right. Malicious prosecution and slander of title not exceptional. The law of malicious prosecution has been particularly pointed to as an instance of such exception. But laying aside the suggestion that the dominating energy may determine for itself what is legal right, and what will defeat legal right, if the remarks before made in regard to permissive right are well founded it is clear that malicious prosecution falls into line with general principle. A few words will make the matter clear.

The term is only a title; the wrong for which an action lies is a malicious prosecution begun without reasonable or probable cause. These facts (with proof of the termination

¹ *South Wales Miners' Federation v. Glamorgan Coal Co.*, 1905, A. C. 239. In this case Lord Lindley expressly refrains from using the word 'malice' because of its ambiguity.

of the prosecution) must be proved by the plaintiff. Now, a man can have no legal right, in the sense of full legal right, to prosecute another without cause; but a man is *permitted* to do so, which is all there is of it. The person so prosecuting is merely exempt from liability,—that men may not be discouraged from resorting to the courts to settle their disputes.

That the matter does not rise higher than permissive right may readily be shown. Suppose that by fraudulent misrepresentation, whether by the person intended to be prosecuted or by another, a civil prosecution, without reasonable or probable cause, is put off until it is barred by the Statute of Limitations; could an action be maintained for the fraud? Clearly not, for as there was no ground for the intended prosecution there could be no violation of right in causing it to be put off,—the intended prosecutor had no legal right in the matter. That the prosecutor in a civil case may be mulcted in costs, as in early times the prosecutor in a criminal case could be,¹ shows the same fact. It is lawful, in the sense that it is permitted, to prosecute without cause; the permission is on the footing that prosecution shall be in good faith. Proof of malice in fact, in either the first, second, or third sense, shows that the prosecution was not so begun.

The action for slander of title is another case of the kind. This is an action for false and malicious disparagement of property. False and disparaging statements of property are permitted;² B *may* falsely declare that A has no title to a certain piece of land claimed by A, or make other false statements concerning A's property,—no action could be maintained against him for doing so. But that is not because B had full legal right to do such a thing; the law simply permits. B could not maintain an action against one who, by using wrongful measures, prevented him from doing the thing, as by tearing up notices or handbills making the false

¹ In early times the false prosecutor in all cases was ‘in mercy.’

² *Gott v. Pulsifer*, 122 Mass. 235, 238; *Wren v. Weild*, L. R. 4 Q. B. 730; *Halsey v. Brotherhood*, 19 Ch. D. 386.

statements. But B may make the statements unless A can show that he made them with malice in fact.

The idea that the law of malicious prosecution is exceptional in requiring proof of malice would have to be put thus: Every one has *prima facie* full legal right to sue or prosecute; hence wrongful means, in accordance with the very doctrine of the foregoing pages, must be shown to make a case for redress. But proof of wrongful means should be enough; malice is unnecessary. The same reasoning would apply to the law of slander of title. I have full right to speak the truth; hence as above, in regard to malicious prosecution.

The answer is, that there are cases in which the mere means or measures alone have always been considered, and justly, to be insufficient to overturn the legal right,—something is needed in addition. Deceit furnishes a ready example; to prove that the result was brought about by means of false representation is not enough,—knowledge of falsity, or some just equivalent, must also be proved. In a word, what in other cases, and sometimes indeed in deceit,¹ is called malice (in a proper sense of that term) is required to make the case. The same may well be true of actions for malicious prosecution or slander of title. The wrongful means would be the false charge or claim; but a man should not be liable in tort for making a false charge or claim, in court or out of court. To wrongful means something must be added; it should not be enough in the case of a prosecution that it was not well founded, for that would discourage resort to the courts,—the law has always and justly required that malice should be proved. And so of false statements out of court in regard to property; proof of falsity ought not to be enough,—the statement may have been made in good faith.

The requirement of proof of malice does not then make the law of malicious prosecution and of slander of title except-

¹ *Pasley v. Freeman*, 3 T. R. 51, Buller, J.: "The gist of the action is fraud and deceit; and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater."

tional, however true it is that legal right is overturned in other important cases by wrongful means alone.

In slander and libel, the law of malice lies somewhat further afield, but it rests on the same sound footing. The plaintiff is not required in the first instance to prove malice, because defamation is in itself unlawful,—there is no case of right, overturned by wrongful means; but if the defence is an attempt to set up a (qualified) privilege, the plaintiff cuts the ground from under the defendant's feet by showing that he made the defamatory statement maliciously. His permission was not properly accepted.

There is then no place, according to the more general current of the common law, at present, in which malice alone can be said to overturn full legal right;¹ but the subject, in any view, is to be considered as occupying a normal place in the law.

It need only be added that where in certain cases, such as slander and libel, the making of a *prima facie* case is sometimes said to establish malice though no evidence of malice has been given, the language is to be taken as a lingering archaism. All that is meant is that *wrongfulness* is established, which wrongfulness in cases having a traditional nomenclature is called malice.²

¹ Quinn *v.* Leathem, 1901, A. C. 495; Allen *v.* Flood, 1898, A. C. 1; Bradford *v.* Pickles, 1895, A. C. 587; Mogul Steamship Co. *v.* McGregor, 1892, A. C. 25 (that the motive of benefiting the defendant at the expense of the plaintiff is not malicious or unlawful, overruling on that point Bowen *v.* Hall, 6 Q. B. Div. 333, 338); Chasemore *v.* Richards, 7 H. L. Cas. 349, 388; Stevenson *v.* Newnham, 13 C. B. 285, 297; Paine *v.* Chandler, 134 N. Y. 385, 390; Frazier *v.* Brown, 12 Ohio St. 294; Payne *v.* Western R. Co., 81 Tenn. 507; Boyson *v.* Thorn, 98 Calif. 578; Glencoe Land Co. *v.* Hudson Co., 138 Mo. 439, 445; Kelly *v.* Chicago R. Co., 93 Iowa, 436, 452; Bohn Manuf. Co. *v.* Hollis, 54 Minn. 223, 233; Chatfield *v.* Wilson, 28 Vt. 49; Jenkins *v.* Fowler, 24 Penn. St. 308; Rideout *v.* Knox, 148 Mass. 368, 372; Rice *v.* Albee, 164 Mass. 88; May *v.* Wood, 172 Mass. 11.

Conversely, good motives will not make that lawful which otherwise is unlawful. Bradford *v.* Pickles, 1895, A. C. 587, 594, 598; South Wales Miners' Fed. *v.* Glamorgan Coal Co., 1905, A. C. 239.

² See post, pp. 301, 302.

In such usage of the term, malice is the mere name of a legal conclusion. It is not an entity; it is only 'malice in law' or 'implied malice,' that is, it is a downright fiction. 'Malice in fact,' required to overturn permissive right, is an entity to be established by evidence.

To sum up the discussion :

That which is not in itself a tort is so far lawful. A lawful thing may be of full legal right or only permissive; how is this lawful thing to be converted into a thing ^{Summary as} unlawful? By wrongful means, by negligence, ^{to malice.} and in some cases regularly by malice in accordance with some such formula as the following:

1. I have full legal right (under freedom to do what is reasonable) to endeavor to buy, to sell, to contract, and to do other things; this right I may lose by the use of wrongful means to accomplish my purpose, or by negligence, but not, according to common-law reasoning, by malice alone.

2. I have permissive right to do a thing,—for instance, to enter my neighbor's land in certain cases, or to bring an unfounded prosecution; if I accept the permission in a malicious spirit (towards my neighbor, or the person prosecuted, that is, towards the plaintiff) I do not accept it according to its terms, and I am liable for what I do as if no permission had been given.

Eliminate now (from the defence) legal right altogether, full and permissive, and assume simply that I have inflicted harm upon my neighbor intentionally; has my neighbor a right of action? To put the question technically, does it make a *prima facie* case for the plaintiff to show simply that the defendant inflicted damage upon him intentionally, where there is nothing to indicate whether the defendant acted of right or not? The answer in ethics is without doubt in the affirmative; and that too is the answer in law in many cases. But is it always so in law, or so generally that it can be laid down as a legal rule that to inflict harm intentionally creates civil liability, in the absence of any evidence of right? An affirm-

Intentional
harm without
evidence of
right.

ative answer has been given.¹ But if the case is to turn on logic, there is ground for doubt. The rule, it will be seen, would create liability though nothing wrongful was done beyond the intentional inflicting of harm.

B inflicts harm upon A by telling him something which is not shown to be false, with intent to harm him. For instance, after A has, by expense and effort, prepared himself to enter into partnership with C, according to C's desire, not yet consummated however by any contract, B informs C that A has been in financial difficulties several times,—this B does to induce C to break off further negotiations with A, and with intent to harm A, and succeeds in his purpose. It has been maintained that B is liable in damages to A;² the contrary too has been decided.³ To take the first view of the case is to say that a representation made with intent to harm, and doing harm, is actionable; but that is contrary to the law of deceit. The rule in question therefore is not a logical rule to that extent; and it should be observed that the law of deceit has a large and important place in the law of contracts as well as of torts.

It cannot be said that there is a defence of 'justification' to an action in such a case. 'Justification' signifies that some particular fact is pleaded in defence of a suit, which fact, it may be, brings the case within a particular rule of law applicable to such cases. But the case in question is not one of the kind. It would not have to plead any fact to bring himself within the particular rule of law; he would demur; he would call upon the court to decide in his favor, upon the very claim of A, as it stands, and the court probably would uphold him. This the court would do on the ground that there was (not a particular rule to be shown by justifying, but) a general rule applicable to everybody,—that for the consequences, though intended, of a statement not shown to be false, no one is liable by municipal law.

¹ *Plant v. Woods*, 176 Mass. 492; *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 613, Bowen, L. J.

² *May v. Wood*, 172 Mass. 11, in dissenting opinion of Holmes, C. J. See also *Plant v. Woods*, 176 Mass. 492

³ *Rice v. Albee*, 164 Mass. 88.

The same would be true of the action called slander of title, and of the action for slander or libel, of the action for malicious prosecution, and probably of other cases. In none of these cases can an action be maintained where it does not appear or is not presumed that what was said or done was false ; and that for the same reason in each case, to wit, because of a general rule of law, not of a particular rule applicable only to persons bringing themselves within it by showing facts in ‘justification.’ If, then, the case is to turn on logic, there is too much of the law which would have to be treated as exceptional, to make good the rule in question. The defendant B is protected in such cases because indeed he has a right to say and do such things, according to common-law reasoning. And so A cannot make a *prima facie* case against B in the way proposed ; he must go a step further and show that B has done something itself wrongful or wrongful by reason of other facts.

Such appears to be the result, if the case is to rest on logic. But there are, as we have seen, plain limitations to logic ; rules of law are not necessarily rules of reasoning. The dominant power of a given time may break up and give place to another or to an unsettled state of things ; and this requires, or may require, a new beginning in the course of the law. The old order is a spent force, and reasoning from it falls to the ground. The present may be a case of the kind ; it may be that a new dominating force requires the rule in question ; if so, there is an end of the matter. And that appears to be the view finally taken in Massachusetts of cases of *combinations* having a malicious (“malevolent”) purpose; capital, as the new social force, displacing equality as the social force of the ‘classical’ period of common law.¹ That position can well be accepted as sound.

¹ *Berry v. Donovan*, 188 Mass. 353, 359; Knowlton, C. J., for the court saying that if combinations of labor for a malicious purpose were to be held lawful, ‘employers would be forced to yield to all their demands, or give up business.’ See *Centralization and the Law*, 9-12. In *Berry v. Donovan* combination was held not to constitute competi-

In many cases it is plain upon ordinary common-law reasoning that to inflict harm intentionally is to create liability in tort. It is now plain too on what footing such cases stand, as cases of logic; they are cases which do not fall within the protection of any *general* rule of law,—they are cases in which protection is to be found, if at all, in justification, as already explained. The defence rests on a particular ground of legal right—permissive or full, it matters not—which brings the subject within some special rule of law applicable to cases of the kind. A applies to B, a druggist, for dandelion, a harmless preparation, and B, or a stranger in the shop, intending to harm A slightly, by way of a practical joke, makes a present to him of a bottle containing more or less of belladonna, a somewhat dangerous preparation, as dandelion, which A uses to his hurt;¹ B puts up a chandelier unsafely, with intent that it shall fall upon and harm A,² which it does; in such cases (and in many others, such as license or other permission ‘of the party’) of intent to harm as the only element of wrongfulness, B (or the stranger in the belladonna case) is *prima facie* liable to A. The motive of B would be immaterial. In some cases of the kind the motive might conceivably be good; as where in the case of the chandelier, the article, being light in weight and of little value, was unsafely hung to fall on and hurt A slightly as a warning to him to be careful, where he had been careless, in attending to the lamps. But that would make no difference. B would have to justify in this and the other cases, if he could, by facts bringing him within some special rule of law.

tion. See also *Pickett v. Walsh*, 192 Mass. 572, which outlaws the sympathetic strike.

Whether the new energy is to be preferred to the old is another question, with which we are not here concerned.

The conception of the dominating power may, of course, invalidate the whole elaborate structure of common-law reasoning over malice in relation to legal right.

¹ Compare *Thomas v. Winchester*, 6 N. Y. 397, where the drug was sold; but that was treated as immaterial.

² See *Collis v. Selden*, L. R. 3 C. P. 495; *George v. Skivington*, L. R. 5 Ex. 1; *Langridge v. Levy*, 2 M. & W. 519; s. c. 4 M. & W. 338.

Finally stripping away malice, negligence, wrongful means,— everything necessary in other cases to turn rightful into wrongful conduct,— it is plain that all that will be left will be cases in which there can be nothing lawful in the defendant's conduct so far as his conduct itself, or his conduct together with its consequences, is concerned. The defendant was not doing or omitting anything which, apart from the way of doing or omitting it, was lawful,— he was doing or omitting what in itself, or with its consequences, was unlawful. The plaintiff no longer has to show that the defendant was inspired by an evil motive, or that he failed to exercise care, or skill, or diligence, or that he resorted to wrongful measures; he simply shows that the defendant did, or omitted, something which in itself and on its face, or with its result, was a breach of legal duty. As these remarks indicate, the illegality of the act or omission is sometimes dependent upon damage resulting, sometimes not.

There is still another class of cases, in which the defendant's conduct was in no ordinary, and indeed in no proper, sense wrongful, and yet because of the special danger attending or following it, it is thought proper that ^{Insurance.} he should be liable for any damage which may result. In other words, he is justified if no damage follows; his acts are at his peril.

§ 4. CLASSIFICATION OF BREACHES OF DUTY IN TORT.

In accordance with the foregoing line of thought the classification of breaches of duty in tort may be put fundamentally as follows:

- Breach of duty (in connection with other ingredients) by,
 - I. Wrongful Means : Fraud.
 - II. Culpable Accident : Negligence.
 - III. Malice.
 - IV. Illegal Acts.
 - V. Damage from Acts at Peril.¹

Thus, the unfolding of the conception of legal right, with which we started, spreads out into the whole law of torts.

¹ Post, § 17.

§ 5. LEGAL DUTY AND BREACH THEREOF.

We have already seen that whether we speak of the breach, by the defendant, of the plaintiff's right, or of the defendant's duty to respect that right, it comes to the same thing; the breach by the defendant of the plaintiff's right is a breach of the defendant's duty. What the plaintiff's rights are in a particular case must of course be considered by the courts; but the law of torts is directed, in terms, more to the infraction of those rights, or the breach of duty, than to the matter of the rights themselves, as the term 'tort' itself imports.¹ To find what constitutes a breach of duty will further be found more practicable than to ascertain what constitutes a breach of right; and then it will be natural to find the division of the subject on lines of duty. To proceed in that way will be to follow the example of the courts.²

Legal duty is of course created by the presence of legal rights; I owe legal duties to my neighbor in so far as I come or may come into contact with his legal rights. How duty arises: observ- Those rights must be observable; duty must al- able danger. ways spring from facts which are or may well be observed; to found liability on any other ground, apart from cases in which one should be virtually an insurer, would be tyranny. It is not necessary that the facts constituting the legal right of my neighbor should actually be observed; enough that they are such that as a man of fair intelligence I ought to observe them.

Indeed, legal duty does not always arise even when danger to rights is observed,—there are many cases in which it does not; but it is a condition in every case to the existence of a legal duty that danger to another's rights shall be observed or

¹ Latin *torquere*, *tortum*; to twist, a thing twisted, *distorted*, hence a wrong—through Anglo-French; at first however a colorless word in the law.

² Bentham would have considered it probable cause for departure that this was the way of the courts; but Bentham is not a light to follow in that matter. That has long been agreed. However, what is coming is in part analysis; that is not to be set aside because Bentham and his followers made a bad use of it.

observable. Further still, if the impending harm cannot be avoided there will be no liability (apart from cases of insurance), unless the fact that the person upon whom the duty is to rest was brought to the place of danger by his own misconduct. If he was there by his own misconduct, it will not save him from liability that it is now too late for him to prevent the harm. The duty in such a case lies further back; and the infringement was in the misconduct which led to danger. Assuming however that there was no misconduct, there can be no liability where harm cannot be prevented. Duty imports ability to perform it. There are however, as several times has been intimated,^{*} special cases in which a man may be liable for harm, though he was free from misconduct in regard to the danger; but liability in such cases rests on the ground that safety should be insured because of the peculiar danger, rather than because of duty in the ordinary sense.

Legal duty in one case may require the doing of an act; in which case omission will be a breach of duty. In another it may require an omission, in which case the breach must consist in an act. Wrongful acts or omissions therefore constitute breaches of duty, according to the nature of the case.

Further, it must be observed that, whatever the duty, it must be a duty to a person complaining of the breach of it, and not merely to some third person. A may have ^{Duty to whom.} been guilty of conduct which is a breach of his duty to B, but not of his duty to C, however much C may have suffered by reason of it. Or it may be a case in which A might have owed a duty to C but for the fact that C has relieved him of it. And it is permissible for one man to exempt another from his duty to him in a particular case when the act or the omission is not a violation of the criminal law.

The duty in question, as we have seen, is established by municipal law. This will serve to distinguish tort from contract; for in contract the duty is commonly fixed by the parties, in the terms of the agreement. But that is not always the case; it happens not infrequently that the parties to a contract leave terms

^{Duty para-}
^{mount or of}
^{municipal law.}

to be supplied by the evidence of custom or by the law itself. In such cases a violation of the term so to be supplied might make a case of tort or of breach of contract, at the election of the injured party; the duty being fixed by law, or, what would come to much the same thing, by custom, the duty would be paramount, and hence the breach could be treated as a tort. Thus, if a common carrier at Chicago were to contract with A to deliver at New York wheat put into the carrier's hands, and fail to do so, he would be liable to A, as for a tort, or for breach of contract, at A's election.

Breach of an implied term of a contract may then, it seems, be treated as constituting a tort whenever the term is supplied by law or by custom; but that is not a matter of much importance in ordinary cases; the question is only one of the preferable remedy. Still, it is to be remembered that in theory the law of torts overlaps that of contract at the place indicated.

It is not to be inferred that there cannot be a tort in respect of the breach of a contract the terms of which are all fully expressed. If the contract contain a false warranty, it is broken in the breach of the warranty; and breach of an affirmative warranty,¹ fraudulently made, may be treated as a tort. So too, what is of much importance, a contract founded upon a false and fraudulent representation, though not amounting to a warranty, may be repudiated, and an action for tort maintained; or the contract may be treated by the injured party as binding, and an action for tort brought to recover damages for the loss caused by getting him into the contract. The explanation is, that the breach of duty sued upon is not in reality a term, express or implied, of the contract; the duty violated is fixed by law,—a duty not to defraud. In this view then the law of tort still further overlaps that of contract.

There is no breach of duty, and no liability for conduct whether consisting in act or omission, (1) if there has been

¹ A warranty affirming a fact, as distinguished from one promising something.

no violation of another's legal right; or, assuming that a *prima facie* case has been shown by the plaintiff, and confining attention to exemptions from liability as distinguished from matter subsequent, such as discharge or the Statute of Limitations, (2) if the plaintiff, being permitted by law to consent, consented to the defendant's misconduct; or (3) if the defendant acted under legal privilege; or (4) if the defendant was under incapacity; or (5) if the plaintiff was guilty of contributory fault in the matter.

These several matters will now be considered in order.

§ 6. DAMNUM ABSQUE INJURIA.

In regard to the first it must be noticed that, aside from cases of insurance, or conduct at peril, it is not enough that the defendant has done or caused damage to the plaintiff; if the defendant's conduct was not at his ^{Wrongfulness} _{necessary} peril, it must have been wrongful in order to make it a breach of duty and a cause of action. This follows from what has already been said; there is no breach of duty, generally speaking, unless danger was observable and preventable. Damage done or caused to the plaintiff in other cases is, in legal language, *damnum absque injuria*,—damage without violation of law; for instance, damage without malice in a suit for malicious prosecution, damage without fraud (in some legal sense or equivalent) in a suit for deceit, damage without negligence in a suit for collision. No fault—‘*culpa*,’ as the Roman lawyers would say—has been shown; fault ordinarily lies behind the act or omission.

§ 7. CONSENT.

Volenti non fit injuria; such was the Roman law, such is the law wherever the English language prevails, and doubtless of the whole world. Indeed English and American law prefers the original language to ^{Meaning of the} rule of consent. translation,—consent bars an action for tort; for the transla-

tion adds nothing, explains nothing, where much is wanted. To what does one consent, where consent bars an action for tort? Will consent, when really given, always bar an action? The language of the rule itself, whether Roman or English, does not tell us; and an answer is required.

The question what one consents to, for the purpose of the rule, though simple in form, proves upon examination, as in many other cases, complex in reality. Does one 'consent' to what is lawful, within the meaning of the rule? Statements by learned judges and writers sometimes import an affirmative answer. A person is hurt in playing ball; if the case be such, as ordinarily it will be, that he cannot maintain an action against any one, even against the very person who hurt him, it is sometimes supposed that the reason is consent, — *volenti non fit injuria*. But that may not have been true; in point of fact it probably was not true; it is not likely that consent was given to what might prove a mortal thing.

It is perhaps nearer the truth to say that, in going into the game with full knowledge and appreciation of the dangers incident to it, all, legally speaking, assumed the risk; for there is a difference in fact, if not in effect, between real consent and assuming risks. Consent is naturally a much more definite idea. But is it not better than either — is it not beyond question true — to say that the game of ball is lawful, and hence that what happens in it, as a mere incident, cannot, for *that* reason, be actionable? Is not recreation lawful, whether it be driving, riding horseback, or playing football? Does driving or riding horseback become unlawful when two or more are engaged and they spur the horses to try their speed? If they collide (without wrongful conduct) is it a case of consent or assuming the risk? — is it not rather that nothing unlawful has happened?

A more important case may be taken, one in which the difference of view will take on a practical difference in result. Criticism of a book, let it be assumed, ruins the sale of it, or greatly mortifies the author and his friends. It has been intimated that the reason why no action can be maintained against the critic is that the author has virtually consented,

by offering his wares to the public;¹ but is that the correct view? If it is, then, it seems, harmful criticism is privileged libel; the critic losing his privilege accordingly if he was actuated by malice. If it is not correct, then, assuming that the language itself does not pass the bounds of proper criticism, the ground of the critic's exemption from liability is that criticism is lawful; and if lawful in the sense that it is a thing of full legal right (as resting on freedom of speech), then in principle it is not overturned by malice. The latter is the better view;² it is hard to believe that criticism can be considered (*prima facie*) libellous.³

Indeed it would not be denied, upon consideration, that the consent which bars an action is consent to what is unlawful, in other words to what the Roman law called 'inuria'; though the language of the rule, *volenti non fit injuria*, does not plainly say so. It must be agreed that a man does not 'consent' to what another has a legal right to do or omit,—whether he consents or not in such a case is immaterial,—unless indeed the legal right is mere permission; in which latter case the ground of the permission or consent should differ in no material respect from ordinary permissive right.⁴ The difficulty under consideration comes of overlooking an unexpressed term of the rule.

Assuming however a true consent — a consent to something otherwise unlawful — the question may still arise, to what the consent extends. That question will, it seems, be of the same nature as the question of agreement, in the sense of an actual 'union of minds,' in contract. A man consents to have his foot amputated; does he consent to unskilfulness or want of care in the operation? Clearly not, until the improbable fact is proved. He might indeed assume the risk, and so bar himself of an action, though he may not actually have consented to the particular thing in question.

¹ *Gott v. Pulsifer*, 122 Mass. 235.

² *Merivale v. Carson*, 20 Q. B. Div. 275. But see *Gott v. Pulsifer*, 122 Mass. 235, 239.

³ The question here is of the meaning of consent; as to the legal conception of criticism, which is another thing, see post, p. 319.

⁴ *Ante*, § 2.

Again the consent, though actual and extending to the particular cause of harm, may have been a consent to criminal conduct. In that case the law, according to common authority, must even in regard to civil liability treat the consent itself as unlawful and ignore it. Thus it is held that either party to a prize-fight, in violation of the criminal law, may, notwithstanding the agreement to fight, maintain an action for damages against the other;¹ and both clearly may be prosecuted in addition by the State.

In regard to this doctrine of the effect of consent to criminal conduct it is plain enough that the State cannot be barred, for the State has not consented; but that the individual should not be barred — that his consent should be ignored as illegal — is another thing. The doctrine that the individual who consented is not barred must rest upon the ground that the rights of the State are of such supreme importance that any violation of them taints the consent for every purpose. That at first may sound plausible; but when it is seen to mean that it gives a right of action to one of the parties to crime, for consequences of the crime itself, the idea offends the sense. A and B commit adultery, or B procures upon A, with A's consent, an abortion;² now even admitting the idea of the pre-eminence of the rights of the State which have been violated, it shocks the sense to say that A can maintain an action against B, as if B had committed an assault upon A. The consent of A has no effect upon the rights of the State, but to say that that fact should result in giving A a right of action is a strain upon ideas of reasonableness and of decency.

Consent obtained by fraud³ or duress would rightly be ignored by the courts. What of consent obtained by undue influence, as that term is understood in the law of wills?

¹ *Shay v. Thompson*, 59 Wis. 540; *Adams v. Waggoner*, 33 Ind. 531; *Bell v. Hansley*, 3 Jones, 131; *Commonwealth v. Collberg*, 119 Mass. 350.

² *Goldnamer v. O'Brien*, 33 S. W. Rep. 831 (Ky.), denying the right of action in a case of abortion, on the ground of assent.

³ *Speight v. Oliviera*, 2 Stark. 493; *Dane v. Wycoff*, 7 N. Y. 191, 194.

Probably it would be considered to fall within the rule under consideration,— *volenti non fit injuria*.¹

§ 8. PRIVILEGE.

Privilege as exemption from liability has already been considered, sufficiently for the present, in discussing legal right; but this warning should be added, that privilege may be absolute, as in the protection of judges, parties, and witnesses in litigation, or only *prima facie*, as in the more common cases of privileged communication, so-called.²

§ 9. INCAPACITY.

The next case of exemption from liability is that of incapacity. This case, in one form or another, takes on a wide aspect. It includes both natural and legal incapacity, and under the latter head may, for convenience at any rate, be considered to include statutory persons, in other words corporations. So the matter will be dealt with here, not in detail, but only so far as may be necessary to make clear the general idea of exemption, and how far it extends.

a. *Infancy and Insanity.*

In the first place then it is to be observed that the breach of duty may be committed by any one having natural capacity.³ The law of torts affords a strong contrast in this particular both to the law of contracts and to the criminal law. Liability in contract depends, it is true, upon capacity to contract; but want of such capacity may be either natural or artificial (legal). One must be of sound mind and at least twenty-one years of age to bind one's self by contract.⁴ Liability under the criminal

Capacity:
criminal law
fraud, malice,
and negligence.

¹ As to the sufficiency of the consent of a minor to a surgical operation see *Bakker v. Welsh*, 108 N. W. Rep. 94; *Michigan Law Review*, Nov. 1906, pp. 40, 41.

² See the chapter on *Slander and Libel*.

³ The law in regard to married women has been so much and so variously changed by statute in the different States that no attempt will be made to consider it.

⁴ Contracts for necessities make an exception.

law depends also upon the existence of capacity, that is capacity to commit crime; but want of this too may be natural or artificial. A person must be of sound mind and at least seven years of age to be subject to punishment under the criminal law.

There may be difficulty sometimes in applying the rule of natural capacity, but the difficulty can seldom arise except in cases requiring proof of negligence, malice, or fraud, and then, generally speaking, only in suits against infants. Where the doing of the act creates, of itself, liability,—that is, where there is a breach of ‘absolute duty,’—a defence of incapacity would be manifestly contrary to the fact, and could not, it seems, be allowed. The fact that the person was of unsound mind or a child of tender years would not be material. It would be enough that the act was done of the will, uncomelled.¹

Cases requiring proof of negligence, malice, or fraud would perhaps create no difficulty where the defendant was a person so unsound of mind as not to be accountable to the criminal law; an action of tort could hardly be maintained. A madman may, indeed, be guilty of fraud or malice in some sense (cunning, it is well known, is a common trait of the insane), but not in the sense in which it would be necessary to create liability, as e. g. in an action for deceit or for malicious prosecution.² And clearly a madman cannot exercise diligence.³

¹ Is a madman's estate liable for the consequences of an act otherwise wrongful which was done, though intentionally, in an uncontrollable frenzy? Or suppose that A threatens to kill B unless B will trespass upon C's land, and B does the act; will it affect the case that B is an infant, insane, or idiotic? By the Roman law, contrary to our own, a lunatic was not liable for damage done to property, any more than if a tile had fallen and done harm (without any one's fault). ‘Et ideo querimus, si furiosus damnum dederit, an legis Aquiliæ actio sit? Et Pegasus negavit; quæ enim in eo culpa sit cum suæ mentis non sit? Et hoc est verissimum. Cessabit igitur Aquiliæ actio quemadmodum . . . si tegula ceciderit.’ Dig. 9, 2, 5, § 2; Lex Aquilia, fr. 5, § 2.

² Comp. Emmens *v.* Pottle, 16 Q. B. Div. 354, 356, Lord Esher.

³ Whoever is incapable of diligentia cannot be charged with negligencia. Wharton, Negligence, § 87, on the Roman law. See Harvard Law Review, May, 1896, p. 65.

A person sane enough to be accountable to the criminal law would probably be liable for any kind of tort.

Infancy is more likely to give occasion for serious difficulty. An infant of sound mind twenty years of age, or much less, is liable for any tort for which an adult might be sued; an infant of five years could seldom be liable in damages for negligence, and would hardly be sued for torts requiring proof of fraud or malice. But within these extremes, there is a region of uncertainty, in which the courts, if called upon to act, must act according to the best light they may have in each particular case; the question of capacity being a question of fact.¹

There is a difficulty of another kind touching the liability of infants and of persons of unsound mind, namely, where what would be a tort in other cases, as for example a fraudulent representation, is the inducement to a contract. But the rule in regard to such cases is that there can be no liability in tort if to enforce an action of the kind would virtually fix upon the incompetent party liability for breach of contract.² The case is or may be quite different where the tort follows, but is not caused by the contract; to enforce an action for tort in such a case would not be to enforce a contract, as for example to compel an infant to make good the loss of a horse which he has borrowed and then directly abused and killed.³

¹ The Roman law in regard to damage to property was more precise; it distinguished between children under seven years, and those between seven and fourteen, and children over fourteen. 'Si infans [under seven] damnum dederit, idem erit dicendum [sc. furiosus, supra, p. 44, note] quodsi impubes [between seven and fourteen] id fecerit, Labeo ait, quia furti tenetur teneri et Aquilia eum; et hoc puto [Ulpianus] verum, si sit iam iniuria capax.' Dig. 9, 2, 5, § 2; Lex Aquilia, fr. 5, § 2. Children over fourteen were liable for delicts. Grueber, Lex Aquilia, p. 14. The contention sometimes maintained that infants are liable only for absolute torts like trespass or conversion, and not for torts like deceit, has not found favor.

² Brooks *v.* Sawyer, 191 Mass. 151; Baker *v.* Stone, 136 Mass. 405; Alvey *v.* Reed, 17 N. E. 265 (Ind.); Wieland *v.* Kobick, 110 Ill. 16; Conrad *v.* Lane, 26 Minn. 389; Fairhurst *v.* Liverpool Loan Assoc., 9 Ex. 422. But see Kilgore *v.* Jordan, 17 Tex. 341. These are cases of infancy.

³ Burnard *v.* Haggis, 14 C. B. n. s. 45.

It should not be supposed to follow that persons under disability can, in virtue of their disability, retain whatever they may have become possessed of by wrongful conduct. The meaning of the law is only that no liability actually or virtually by way of contract can be created against such persons. Infants have been compelled to surrender premises obtained under lease by them, through fraudulent representations that they were of full age, upon the ground that an infant shall not take advantage of his own fraud to keep his ill-gotten gain. He must restore what he has obtained by fraud, if he has it and will not carry out his bargain.¹ But cases of this kind, not being actions for damages, do not fall within the scope of this book.

b. *Corporations.*

Allied to the class of cases of persons under disability, so far as right is concerned, are corporations. These are bodies which, when created by statute, as usually they are, have no powers or rights but those conferred by the statute; and since statutes seldom if ever confer upon corporations all the powers or rights of citizens, it follows that corporations are more or less under disability. And the fact that a corporation is not a natural person has been looked upon as a serious obstacle to holding such a body liable (except in the case of a corporation sole) for torts in which mental attitude is part of a *prima facie* cause of action, and in very early times for torts of any kind;² which of course dis-

¹ *Lemprière v. Lange*, L. R. 12 Ch. 675.

² ‘The difficulty felt in earlier times was one,’ it is said, ‘purely of process; not that a corporation was metaphysically incapable of doing wrong, but that it was not physically amenable to *capias* or *exigent*. 22 Ass. 100, pl. 67, and other authorities.’ Pollock, *Torts*, 58, 6th ed., citing Serjeant Manning’s note to *Maund v. Monmouthshire Canal Co.*, 4 *Man. & G.* 452. Of course in modern times personality is a test whether, in contemplation of law, there has been an act (or an omission). Trees, boats, and animals cannot in these days be guilty of misconduct,—mind in men is the test; and corporations clearly have not personality in the sense in which men have; but a corporation has personality in the sense that it can express its mind, and that expression may as well be *maliⁿcious* as not.

regarded the fact that those composing the corporation were human beings, for they were not the corporation.

But that view has mostly given way, and it is now probably general doctrine that the fact that what would be a tort in the case of an individual was done or omitted by a corporation, makes no difference. That is, though not having all the rights of individuals, corporations must still respect the rights of individuals, — their duties are measured by the rights of those with whom they come into contact. Thus a corporation committing torts by fraud or of malice¹ is liable for the same as clearly as for torts committed by negligence; a corporation is liable also for assault, false imprisonment, and probably for all kinds of torts.² An exception has been made by some courts in favor of charitable corporations, on the ground that where funds have been given to a body incorporated for such public purpose they should not be diverted to pay for damages for the torts of its agents or servants, where due care has been taken in selecting its men.³ Other courts refuse to admit the exception, and it seems on better ground.⁴

¹ See e. g. *Smith v. Land & House Corp.*, 28 Ch. Div. 7 (deceit); *Cornford v. Carlton Bank*, 1900, 1 Q. B. 22; s. c. 1899, 1 Q. B. 392 (malicious prosecution); *Vance v. Erie Ry. Co.*, 32 N. J. 334 (the same); *Jordan v. Alabama R. Co.*, 74 Ala. 85 (the same); *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25 ('conspiracy'); *Fogg v. Boston & L. R. Co.*, 148 Mass. 513 (libel). In *Comerford v. West End Ry. Co.*, 164 Mass. 13, doubt is raised whether a corporation is liable for slander or libel by its servants or agents in the course of their employment, unless the act was authorized or adopted by the corporation. But it may be doubted whether this distinction is well taken. Cases denying any action for malicious prosecution have been overruled in this country by *Jordan v. Alabama R. Co.*, *supra*, *Boogher v. Life Association*, 75 Mo. 319, and by other cases. But see the remarks of Lord Bramwell in *Abrath v. Northeastern Ry. Co.*, 11 App. Cas. 247, 250, which were not followed in *Cornford v. Carlton Bank*, *supra*.

² As to *municipal* corporations see *Rhobidas v. Concord*, 47 Atl. Rep. 82 (N. H.).

³ *McDonald v. Massachusetts Hospital*, 120 Mass. 432; *Hearns v. Waterbury Hospital*, 33 Atl. Rep. 595 (Conn.); *Downs v. Harper Hospital*, 101 Mich. 555; *Heriot's Hospital v. Ross*, 12 Clark & F. 507, 513, dictum of Lord Cottenham.

⁴ *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93; *Glavin v. Rhode Island Hospital*, 12 R. I. 411. See *Fire Ins. Patrol v. Boyd*, 120 Penn. St. 624.

It is obvious that disability in the way of immunity from liability for acts or omissions does not of itself involve diminution of rights; nothing but alienage or the commission of crime works abridgment of rights, so far as the subject of rights of action is concerned. All persons except criminals undergoing punishment, and aliens, whatever their incapacity to incur liability, may sue for tort; and the disability of criminals and of aliens to sue has nearly become a thing of the past under enlightened legislation.

§ 10. CONTRIBUTORY FAULT.

We come now to the last case of exemption.

According to more general common-law doctrine, the defendant's misconduct must have been the legal cause, or part

Plaintiff's misconduct as part of the cause of trouble. of the legal cause, of that of which the plaintiff complains, to enable the plaintiff to recover judgment. Having regard to the defendant and third persons, it need not be the sole cause; it matters not that others helped the affair along, so far as the right of the injured person to sue any one (as well as all of them) is concerned. But considering only the person injured and the defendant, the defendant's conduct must have been the sole cause of complaint; if the plaintiff's own conduct made part of the cause of action, he cannot recover.

In such a case the defendant has violated no duty to the plaintiff, whatever duty he may have owed; it is the plaintiff and the defendant together who have done or omitted the thing complained of. And whatever might be said in favor of separating the conduct of the defendant from that of the plaintiff, where the plaintiff's conduct was not the sole cause of the injury, the courts generally have looked upon it as unwise, if not impracticable, to attempt to administer the law in that way.¹

¹ A few courts have, in cases of negligence, adopted a suggestion of admiralty law, and resorted to a *comparison* of fault between the plaintiff and defendant, rejecting the doctrine of contributory fault. See post, p. 50.

The courts however are very careful to distinguish mere conditions from legal causes.¹ In a certain sense of the word 'cause' the plaintiff cannot but be part at least of the cause of his misfortune, for unless he or his property was where he or it was at the time in question, no harm could have befallen him, and that of course whether his own conduct in the matter was wrongful or not. But that is not the conception of cause which the courts have adopted; the courts distinguish, as was just stated, between things or situations which are but conditions necessary to the happening of any misfortune, and things or situations which in themselves have the plain promise of misfortune. A result, legally speaking, is caused when it happens as the natural effect of that which brings it to pass; the case is this, that standing with knowledge or what should be accounted for knowledge of certain facts, harm is likely to follow in natural course. Hence there can be no breach of duty by the defendant when, in such a case, the plaintiff himself does or omits to do the thing which, though in necessary connection with the defendant's misconduct, is likely to produce the harm.

On the other hand, if what the plaintiff has done or omitted was not likely to produce the harm, or any harm at all, his doing or omitting is no more than a condition to the result, and the defendant *has* violated his duty to the plaintiff. He alone, considering none but the plaintiff and the defendant, has caused the damage.²

The doctrine in question is obviously a general one, applying to all torts. As a matter of fact however it is seldom called into service except in cases of negligence; there almost exclusively it has found its development, and there it has special phases that will require particular examination when the subject of negligence is reached. The reader is accordingly referred to the chapter on Negligence for further information.³

¹ See e. g. *Newcomb v. Boston Protective Department*, 146 Mass. 596.

² The case is often treated as a phase of the maxim 'causa proxima, non remota, spectatur,' considered in the next section.

³ See also L. C. Torts, 721-725.

It should however be stated here that there is a tendency, especially in legislation (as in regard to employers' liability), to restrict and in some cases to set aside the rule of contributory fault.¹

§ 11. EXTENT OF LIABILITY.

Liability may of course come to an end in various ways, as by discharge or by the Statute of Limitations. All such matters, which are defences, we pass by, to consider only a single subject relating to the cause of action, as akin to the subjects heretofore under consideration.

Liability for tort having been incurred, how far does it extend? For it is obvious that a train of unfortunate results may follow. The general answer to the question, though scarcely an answer at all until explained, *Causa proxima, non remota, spectatur.* is that a man is liable for all such consequences of his torts as, legally speaking, he has caused. This answer is often put in terms of a maxim or rule of the Roman law, adopted into our jurisprudence; ‘causa proxima, non remota, spectatur,’ — the law regards the ‘proximate,’ not the ‘remote’ cause.

With reference to this maxim, nothing could be more misleading than to take it in its plain, primary sense; in that sense the law as often regards the ‘remote’ and disregards the proximate cause, as it does the contrary. A tosses a lighted squib into one of the booths of a market, and B, the owner of the booth, instinctively throws it out and it falls into the booth of C, who repeats the instinctive act, but now the squib strikes D in the face and puts out an eye. C obviously is nearest, or ‘proximate’ in the primary sense, to D, and A is most ‘remote’ of all; and yet A is liable to D, and C probably is not; A is liable whether C is or is not, supposing that C has acted instinctively and not of purpose, negligence, or other wrongful conduct towards D.² It is obvious that the maxim is to be

¹ The rule does not apply to prosecutions for crime. *State v. Moore*, 106 N. W. Rep. 16 (Iowa).

² *Scott v. Shepherd*, 2 W. Black. 392.

taken in some metaphysical sense; B and C must be regarded as machines, and the final result as happening in the natural course of things.

'Results happening in the natural course of things' is the more common way of putting the case; a tort having been committed, the wrongdoer is liable for whatever happens in the natural course of things, having ^{Natural course of things at outset.} regard to the time when the tort was committed.

The rule does not mean, broadly, that liability extends to whatever occurs in the course of nature; it means what occurs in the course of things natural or probable when the wrongful conduct took place. Thus a person who, in violation of law, should start a fire in the highway would be liable for damage done by any spread of the fire in the condition of the atmosphere when the fire was started, or while it was still under control; but probably not for damage produced by a hurricane or tempest suddenly and unexpectedly arising.¹

On the other hand, it is not necessary that the *particular* mischief resulting should have been foreseen or regarded as probable. A person who sets a fire wrongfully, ^{Actual result need not have been foreseen.} or does not properly guard a fire which he sets, in a dry stubble in midsummer, is liable for damage done by its spread, under the observable conditions of the air at first prevailing, even in case the fire should unexpectedly cross broad fields and extend to buildings or haystacks beyond.² In like manner one who wrongfully sets a fire or unlawfully allows a fire to get under way among timbers floating down a stream, the burning timbers finally causing the destruction of property several miles below, is liable for the loss; he has in the legal sense caused the loss, however improbable it may have been, because it happened in the natural course of things understood. So, again, one who unlawfully strikes another will be liable, it seems, for what ensues naturally from the known state of things in the per-

¹ Fottler *v.* Moseley, 185 Mass. 563, misrepresentation.

² Smith *v.* Southwestern Ry. Co., L. R. 5 C. P. 98; 6 C. P. 14 (Ex. Ch.).

son struck, though the result appears to be out of proportion to the blow,¹ though probably not for consequences due, with the blow, to some occult and unknown disease.²

It is enough in all such cases that the wrongdoer knows, or is bound to know from the facts of which he is aware, that **Liability for consequences turns on duty.** harm will follow, or is likely to follow, his proper act or omission in the understood state of things. The conditions to the harm which follows are before him; danger is observable. This is again returning to language used in speaking of duty. Duty exists where (harm being avoidable) danger, either directly or through facts which the defendant knows or ought to know, is observable. It must follow that duty lasts to, and includes all results flowing naturally or probably from, the defendant's wrongful act or omission; duty equally must end at, and exclude, results which happen out of natural course, as things were known to exist. And liability must end where duty ends; the plaintiff can have no right towards which there is no correlative duty. The doctrine of duty then, rightly understood, determines both the creation and the termination of liability.

This way of putting the case, which is now the usual way, puts aside, for the present purpose, the dogma that a man intends the natural and probable consequences of his conduct. The statement is not only unnecessary, it is untrue in most cases. The notion appears to spring from an idea that liability for the consequences of conduct depends upon intention to bring the consequences to pass; for which there is no authority. There will of course be intention, since every psychic act or omission necessarily implies intention. But the resulting breach of duty and infringement of right (where the act or omission

¹ See *Stewart v. Ripon*, 38 Wis. 584.

² Compare *Stewart v. Ripon*, *supra*; *Sharp v. Powell*, L. R. 7 C. P. 258. For other cases involving the general principle, see *Vandenburgh v. Truax*, 4 Denio, 464; *McDonald v. Snelling*, 14 Allen, 290 (defendant negligently running into a team and causing the horses to run away and collide with plaintiff's sleigh); *Farrant v. Barnes*, 11 C. B. N. S. 553.

was wrongful) may not have been in the mind at all, that is, may not have been intended; and it has never been supposed to be necessary to say that the result is intended where it follows closely upon the act or omission. Liability arises in the case because the misconduct caused the breach. So in these other cases, where the misfortune is further off in time or space. The question simply is, whether the defendant's conduct caused the harm. The dogma in question confuses acts and omissions with their effect.

There is, or may be, special difficulty where the train of events instead of going on in nature, or through human beings acting mechanically, extends through the acts of men conducting themselves freely and without constraint. In such cases it appears to be necessary that the intermediate human agencies should act in accordance with the purpose, or with what might reasonably have been expected from the conduct, of the one further back who set the train in motion. The connection between the sufferer and such person would be broken if some one, or some force of nature, between them were to act in the matter 'out of course,' that is, in a way not to be expected; the wrongdoer can owe no duty to a person who sustains damage from the wrong, unless in natural or probable course.¹

Intermediate
human
agency.

But if the intermediate persons, few or many, act in accordance with the purpose, or with what might reasonably have been expected from the conduct,² of the one back of them, though they be not his agents or his servants, he will be liable for damage done, not because the acts of the intermediate persons are in fact his acts, but because he has, legally speaking, caused the damage. He owed a duty to the person who should ultimately fulfil his purpose or act as might have been expected. And that duty has been violated.

¹ See such cases as *Carter v. Towne*, 103 Mass. 507; *Davidson v. Nichols*, 11 Allen, 514; *Insurance Co. v. Tweed*, 7 Wall. 44, 52.

² *Lynch v. Nurdin*, 1 Q. B. 29, 55 R. R. 191; *Engelhart v. Farrant*, 1897, 1 Q. B. 240; *McDowall v. Great Western Ry. Co.*, 1903, 2 K. B. 331 (C. A.), reversing 1902, 1 K. B. 618, on the effect of the evidence.

The principle in question applies generally to all kinds of tort, but as a matter of fact it seldom finds expression except in cases of negligence; some phases of it are almost of necessity phases of negligence. The consequence is that the subject must be considered particularly under that head, and it will not be pursued further here.

§ 12. MASTER AND SERVANT.

The next subject to be considered is that of master and servant, where a tort has been committed by or through the servant. By the term 'servant' appears to be meant one who, being strictly subordinate to and dependent upon the will of his employer within the terms of the employment, does not make, or rather is not engaged to make, contracts for his employer.¹ Such a person, when engaged in a lawful employment, and acting as a servant and at the same time not 'wilfully' (in the sense of purposely) or with knowledge, actual or presumptive, participating with his employer in wrongdoing, is not liable for the consequences of his acts or omissions as torts. 'Respondeat superior.'

There is no anomaly in this, for it may well be that the wrongfulness of what has been done or omitted depends upon knowledge or means of knowledge possessed only by the master. In such a case there being on the part of the servant nothing to suggest harm or danger, he does not see that any one's rights are being or are likely to be infringed, and hence he cannot be guilty of any breach of duty. The contrary will usually be true where the servant, though acting under command, understands, or ought from facts known to

¹ When one is employed to make contracts for the employer, thus bringing about a new relation, the case deserves another name, and has it in 'agency.' See Huffcut, Agency, § 4; Harvard Law Review, April, 1896, p. 512. A person may be my servant for general purposes, as for instance my coachman, and yet directly my agent, as when I send him to purchase new furnishings for my carriage or to have the carriage painted; he would still be called a servant, though exercising exceptionally the function of an agent.

him to understand, that the rights of others will be infringed, and yet executes his orders.

As regards the liability of the servant then, the case is normal, falling in with the general doctrine of rights and duties. It is very different as regards the liability ^{Master's liability.} of the master; his liability lies outside anything that has gone before in this consideration of the law of torts. The observability of harm or danger, from facts at hand, or facts one ought to know, is, as we have seen, the basis of duty; but a master may be liable for the torts of his servant, though to *him* (the master) there was no ground for apprehending harm; he may have been a thousand miles away — enough that the servant's act or omission was in the course and within the scope of his employment, even though contrary to the master's own orders.

Various attempts have been made by judges and writers to account for this doctrine, but it must be said that they have not been very successful. Sometimes it has been said that there is an implied command for every act of the servant in the service of his master;¹ but that is only another way of saying that the act is in law authorized, which is true, but is no explanation of the case. It has also been said that the master has put the servant in the master's place to do the master's work; or to do the class of things embraced in the particular case.² But this also, if in less degree, is unsatisfactory; and so of most other reasons given in the books. The one ground which cannot be disputed, and probably is the true one, is that the judges have on the whole concluded that, in the interests of the State, or on what is often called public policy, it is best that the master should be liable.

But the master is liable only when the servant was at the time acting within the scope of his employment, which appears to mean acting for the master;³ and as has already been in-

¹ Blackstone, i. 417.

² Bayley *v.* Manchester R. Co., L. R. 7 C. P. 415; Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259; British Banking Co. *v.* Charnwood Ry. Co., 18 Q. B. Div. 714, 718; Bigelow, Fraud, i. 228, note.

³ British Banking Co. *v.* Charnwood Ry. Co., 18 Q. B. Div. 714 (agency).

timated, a servant may be acting for his master, so as to fix upon the master liability for tort, though the servant was at the time violating his master's plain orders. Thus I may send my servant with horse and wagon on an errand to a certain town, and tell him that he must not go by a certain road because it is in a dangerous condition; but if in the course of the errand he goes by that road, and while in it injures some one by negligent or even by wilfully bad driving, I am liable.¹

There was some question formerly whether a master could be held for what were called 'wilful' torts by his servant, though committed on behalf of the master; but the doubt has disappeared, and the master would now be held liable.² Thus, if a servant of a railway company should commit an assault upon a passenger in a train, in the course of his employment and not in consequence of something outside of the same, the railway company would be liable.³

The moment the servant ceases to act for his master, though still remaining in the service, the master's liability ceases, and does not arise again until the servant begins once more to act for him.⁴ Thus, if after starting out upon an errand for his master, the servant should turn aside for purposes of his own or another's, as if he should go off to make a purchase for himself or for some friend, or if he should go to see a game of ball, the master could not be held for torts committed by him while so doing.⁵

The doctrine which imposes liability upon the master is a general one, applying as well to cases of slander and libel,⁶

¹ *Howe v. Newmarch*, 12 Allen, 49.

² *Id.*

³ See *McGilvray v. West End St. Ry.*, 164 Mass. 122; *Daniel v. Pittsburgh Ry. Co.*, 23 S. E. Rep. 327 (N. C.); *Lynch v. Metropolitan Ry. Co.*, 90 N. Y. 77; *Pennsylvania R. Co. v. Vandiver*, 42 Penn. St. 365; *Bayley v. Manchester R. Co.*, L. R. 7 C. P. 415.

⁴ See *Rayner v. Mitchell*, 2 C. P. D. 357, as to the servant's re-entering upon his service.

⁵ See *Storey v. Ashton*, L. R. 4 Q. B. 476; *Rayner v. Mitchell*, 2 C. P. D. 357; *Mitchell v. Crasweller*, 13 C. E. 237.

⁶ *Smith v. Utley*, 65 N. W. Rep. 744; *Dunn v. Hall*, 1 Ind. 344; *Huff v. Bennett*, 4 Sandf. 120; *Davison v. Duncan*, 7 El. & B. 229. A receiver

malicious prosecution,¹ and other torts,² as to cases of negligence and trespass.

Closely allied to master and servant, for the purposes under consideration, is the relation of principal and agent. It is sometimes put as a distinction between the Principal and two relations, that a servant can exercise no independent discretion, but is subject at all times to the control and direction of his master, while an agent acts largely upon his own discretion; but the distinction will not bear examination. So far as there is a difference in the matter of discretion between the two relations, it is a difference of kind, not a difference between the absence and the existence of discretion. A servant must frequently exercise a very wide and important discretion, especially when his master is beyond reach. A servant employed to drive a stage-coach or an electric car has the care of human lives committed to him, and their safety will depend very much upon the exercise of his own discretion;³ and on the other hand even the simplest kind of service involves the exercise of discretion, otherwise a stupid servant would be as useful as a bright one. The master cannot be present all the time to direct his servant.

The real difference is in the kind of discretion to be exercised; an agent in the full sense, while, like a servant, subordinate to and not independent of his employer, is employed to make contracts for his principal. That makes a fundamental difference; but it does not bring about any special result in regard to the principal's liability for his agent's torts. The liability of a principal is the same as that of a master, whatever the tort. And the limits of liability are the same; a principal, like a master, is liable for his agent's torts only when

in chancery is not exempt from liability. *Martin v. Van Schaick*, 4 Paige, 479.

¹ *Vance v. Erie Ry. Co.*, 32 N. J. 334.

² *Smith v. Land & House Corp.*, 28 Ch. D. 7.

³ 'That the proper management of the boilers and machinery of a steamboat requires skill must be admitted. Indeed, by the Act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it.' *New World v. King*, 16 How. 469.

his agent is acting for him, not when the agent is acting for himself, even though doing something which he might have done for his principal.¹

To the general rule by which a principal is held liable for the torts of his agent committed on his behalf a single exception has sometimes been made, to wit, that an innocent principal should not be liable for the fraudulent misrepresentations of his agent, which as a matter of fact were not authorized, though they were made in the course and within the scope of the agent's employment.² This appears to rest upon the ground that the general rule imposing liability upon one who, morally speaking, is guiltless is exceptional and harsh. Such a rule it is thought should not be extended to a new class of cases not necessarily within it, except upon grounds of urgent public policy. The tendency of the authorities however has been steadily against this view, and accordingly most of the courts, refusing to make any exception, hold the principal liable.³ All would agree that if the principal derived a benefit from his agent's fraud, without offering to return it upon discovering the deception practised, he would be liable.

For the torts committed by one of two or more servants to the damage of a fellow servant, the master is not liable, unless
Fellow servants. statute makes him liable. Cases of the kind seldom arise except in negligence, and hence the rule is commonly justified in terms relating to negligence. The servant, in entering the service, assumes, legally speak-

¹ British Banking Co. v. Charnwood Ry. Co., 18 Q. B. D. 714.

² Kennedy v. McKay, 43 N. J. 288; Western Bank v. Addie, L. R. 1 H. L. Sc. 145. See Bigelow, Fraud, i. 228. The principal is 'innocent' in the double sense of not in fact having authorized the representation, and not knowing or having reason to know that it was false.

³ Allerton v. Allerton, 50 N. Y. 670; Creig v. Ward, 3 Keyes, 393; Durst v. Burton, 47 N. Y. 167; Jeffrey v. Bigelow, 13 Wend. 518; White v. Sawyer, 16 Gray, 586; Fitzsimmons v. Joslin, 21 Vt. 119; Presby v. Parker, 56 N. H. 409; Lee v. Pearce, 68 N. C. 76; Hopkins v. Snedaker, 71 Ill. 449; Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259 (Ex. Ch.); Mackay v. Commercial Bank, L. R. 5 P. C. 394; and other cases cited in Bigelow, Fraud, i. 227.

ing, the risk of everything which is incidental to the employment, and this is declared to include the negligence of a fellow servant.¹ But the exemption from liability is not, it seems, limited to cases of negligence; the employer, whether a master or a principal, is not liable at common law, it seems, for damage wrongfully done by one servant or agent to his fellow in the course of the business, whatever the nature of the tort, whether of negligence, fraud, malice, or anything else.

The doctrine that the servant assumes the risk of negligence on the part of his fellows is not then broad enough, even if it were not what it appears to be, an arbitrary doctrine, generally untrue in point of fact. It would be still less true to say that a servant assumes the risk of torts in general by his fellows. The truth appears to be that, without resorting to fiction, a servant stands in a different position towards his master from that of a stranger. This may be seen by supposing the case of a man's children, who in law are his servants, or of a man's domestic servants; the idea that one of these could sue the master for torts of another of them would be revolting. The case of non-domestic servants differs only in degree, and the degree of difference must be considerable to justify an alteration of the common law even in cases of negligence; much more so in other cases. Masters furnish the means of support for servants, and hence should not be liable to their servants unless *they* have done them wrong. The relation is beneficent towards the more dependent classes, and should not be discouraged.

The relation of servant or agent is one of strict dependence upon the authority of the employer; it is ^{Independent contractors.} on that footing that the latter is liable. When the employment does not create dependence, when the person employed is, in the conduct of the employment, independent of the person engaging him, when in a word he is what is called in the books an 'independent contractor,' the employer

¹ Post, p. 172.

is not liable for the torts of such contractor;¹ unless the misconduct of the contractor was itself also a breach of duty owed by the employer, as where there was a vice in the very undertaking.² Thus if I enter into contract with a builder to erect a house for me, or to make over a factory into a house, he alone will be liable to others, until I resume control, for torts committed in the course of the work, notwithstanding the fact that the work is done for me.³ And so in turn if he should employ an independent sub-contractor for part of the work, such as putting in the gas fittings, such sub-contractor, and not the chief contractor, much less the first employer, will be liable for torts committed in performing the sub-contract, until he turns over his work to the principal contractor.⁴

The qualifications to this doctrine, as has been indicated, are found in cases in which the employer owed some duty to others regardless of the 'independent contract,' which that contract does not relieve him of. Thus the owner of premises owes the duty to others not to maintain, or allow to be maintained, a nuisance upon his premises, and if in consequence of a contract with another a nuisance is created there, the owner will not escape liability because the person immediately guilty of causing it is an independent contractor.⁵

¹ *Hilliard v. Richardson*, 3 Gray, 349; *L. C. Torts*, 636; *Gorham v. Gross*, 125 Mass. 232; *Cuff v. Newark R. Co.*, 6 Vroom, 17; *Brown v. Accrington Cotton Co.*, 3 H. & C. 511; *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335; post, p. 141.

² *Gorham v. Gross*, 125 Mass. 232; *Sturges v. Theological Education Soc.*, 130 Mass. 414; *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, 341, 352; *Penny v. Wimbledon District Council*, 1899, 2 Q. B. 72, C. A.

³ *Hilliard v. Richardson*, *supra*.

⁴ *Cuff v. Newark R. Co.*, *supra*; *Rapson v. Cubitt*, 9 M. & W. 710; *Overton v. Freeman*, 11 C. B. 867. See *L. C. Torts*, 657. 'In ascertaining who is liable for the act of a wrongdoer, you must look to the wrongdoer himself, or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable.' *Murray v. Currie*, L. R. 6 C. P. 24, 27, Willes, J. This of course relates to collateral negligence.

⁵ *Sturges v. Theological Education Soc.*, *supra*; *Harding v. Boston*, 163 Mass. 14; *Hardaker v. Idle District Council*, *supra*; *Hilliard v. Richardson*, *supra*.

The same would be true if the thing authorized to be done by the contract were wholly illegal, or wholly without the sanction of law, as if a town, having no authority to lay gas pipes through its roads, should contract with a person to lay such pipes, and some one should be injured by nuisance, trespass, or negligence on the part of that person, in the work.¹ And the like would be true of cases in which a private corporation having special duties towards the general public, as in the case of a railroad company, should employ an independent contractor to do work for it in premises which the company was bound to have in fit condition for business of the public; in such a case the railroad company could not delegate or otherwise get rid of its own duty to the public.² Liability in such cases, it should be noticed, is not confined to negligence.

§ 13. DAMAGE.

We have seen that tort gives rise to a suit for damages. But that does not necessarily imply that the plaintiff must have sustained some loss or detriment. Like a technical 'fraud,' 'damage' is a technical term. There are many cases in which the defendant would not be allowed to show that the plaintiff had not suffered a pennyworth. On the other hand, there are many cases in which the plaintiff cannot recover judgment without proving that the act or the omission of the defendant caused a loss to him.

Loss in the sense of actual harm or prejudice is called in the law special damage, though the term 'special damage' is sometimes used in the sense of a particular kind of loss.³ The contrasting term is implied or legal damage; this imports a mere violation of legal right. Speaking broadly the cases in which it is not neces-

Special damage: when
not necessary.

¹ *Ellis v. Sheffield Gas Co.*, 2 El. & B. 767.

² *Cuff v. Newark R. Co.*, supra; *Storrs v. Utica*, 17 N. Y. 104; *Chicago v. Robbins*, 2 Black, 418; *Holmes v. Northeastern Ry. Co.*, L. R. 4 Ex. 254; *Smith v. London Docks Co.*, L. R. 3 C. P. 326.

³ *Ratcliffe v. Evans*, 1892, 2 Q. B. 524, 528, Bowen, L. J.

sary to prove special damage in an action for tort are cases in which the act done is manifestly dangerous, so much so that instinct calls at once for redress and would take it but for the law. Rights of life, liberty, property, and reputation furnish the subjects of such redress. Attempts upon life, whether to take life or not; restraint of liberty; interfering with property; assailing one's good name; such acts call for redress without regard to the question of loss. One would instinctively seek redress in such cases; and the law only sanctions, what it must in some way always sanction, instinct. If one had to endure acts of the kind not causing loss, one would be constantly at the mercy of bullies and lawless men. For the specific cases to which these remarks apply, the 'Statement of the duty' at the head of the several chapters should be consulted, where the presence or absence of the word 'damage,' there used in the sense of loss or special damage, will give general information; but for the shades of meaning of the term 'special damage,' the particular torts of the law will need to be consulted.

One special feature relating to the term may be referred to here. To constitute damage in the sense of loss or special damage, it appears, by the current of authority, ^{Mental suffering as damage.} to be necessary that something more than mental suffering, or a shock to the nerves alone, without 'impact'¹ though followed by sickness, should have been caused.² A workman on a house might negligently let a stick fall at my feet, as I was passing along the street, and if, though startled, I was not hit, the workman probably

¹ Victorian Rys. Comm'r's *v.* Coultas, 13 App. Cas. 222; Huston *v.* Freemansburg, 212 Penn. St. 548, 61 Atl. Rep. 1022, 3 L. R. A. (N. S.) 49; Spade *v.* Lynn R. Co., 168 Mass. 285; s. c. 172 Mass. 488; Texarkana Ry. Co. *v.* Anderson, 67 Ark. 123. But see Lyne *v.* Western Union Tel. Co., 123 N. C. 129; Telegraph Co. *v.* Mellon, 96 Tenn. 66. See also Helms *v.* Western Union Tel. Co., 55 S. E. Rep. 831 (N. Car.). The doctrine rests partly on the ground of the difficulty of getting at the truth, partly on the ground that mental suffering is very much a matter of individual temperament and susceptibility.

² Terwilliger *v.* Wands, 17 N. Y. 54, 63; Wilson *v.* Goit, id. 442.

would not be liable for the act;¹ but if he threw the stick at me, with the same result, he would be liable, for passion would instinctively be aroused to redress.² But rather inconsistently, mental distress may be considered as an element in damages in any case where a right of action is shown regardless of such distress.³

Finally, the fact that a tort is redressible in damages serves to distinguish the wrong from a crime; which is redressed by prosecution on behalf of the public for the purpose of punishing the accused, by imprisonment, fine, or forfeiture. But most crimes attended with loss may also be treated as torts. Homicide is an exception, apart from cases falling within statute. It will be seen then that the law of torts, which we have found overlapping the law of contracts on one side, overlaps on the other the criminal law. But the greater part by far of the domain of tort lies between the two extremes.

In explanation of the examples given throughout the general text following, it is to be observed that when a particular act or omission under consideration is said to be a 'breach of duty,' or of 'legal duty,' or of the 'duty under consideration,' it is assumed that other elements of liability, if there be such, are present. Further, 'breach of duty' or the like implies a right of action in damages. And the term 'damage,' standing alone, is generally used in the text, as well as in the 'Statement of the duty,' in the sense of 'special damage,' actual loss. The 'Statement of the duty,' it may be added, is intended to suggest a *prima facie* case.

¹ Compare Victorian Rys. Comm'r's *v.* Coulter, *supra*, fright upon danger of collision with a railway train.

² Another reason has well been given, that an intended wrong is more likely to do harm than one not intended. See *White v. Duggan*, 140 Mass. 18, 20.

³ See *Warren v. Boston & M. R.*, 163 Mass. 484, 487; *Harvard Law Review*, January, 1894, p. 304; *Spade v. Lynn R. Co.*, 166 Mass. 285, 290; *s. c.* 172 Mass. 488, 490.

§ 14. DEFINITION OF TORT.

Having in mind what has been said in the preceding sections as constituting the substance of a tort, a definition of the term may now be given. To attempt a definition which would tell its own story on its face ~~must be taken with explanation.~~ would be hopeless. Indeed no definition, helped out however much by explanation, can convey an adequate notion of the meaning of the word; nothing short of careful study of the specific torts of the law will answer, for there is no such thing as a typical tort, an actual tort, that is to say, which contains all the elements entering into the rest. One tort is as perfect as another; and each tort differs from the others in its legal constituents. But they all have this in common, that there must be a breach of duty paramount, or, as we shall now put it, established by municipal law; and they all lead to an action for damages. These facts must furnish our definition. Accordingly a tort may be said to be, *a breach of duty established by municipal law for which a suit for damages can be maintained; or, conversely, the infringement of a private right, or a public as a private right, established by municipal law.*

§ 15. DEATH OF PLAINTIFF OR DEFENDANT.

'*Actio personalis moritur cum persona.*' Expressing the rule in terms of the Roman law, the courts have from early times declared that (most) torts cease, with the death of either of the parties to them, to carry liability.¹ Both the origin and the justification of this rule are matter of doubt; but no common-law rule has been more steadily maintained, except as statute

¹ See e. g. *Bowker v. Evans*, 15 Q. B. Div. 565, death of plaintiff. The rule is not confined to torts. The action for breach of promise of marriage '*moritur cum persona.*' *Finlay v. Chirney*, 20 Q. B. Div. 491; *Hovey v. Page*, 55 Maine, 142; *Lattimore v. Simmons*, 13 Serg. & R. 183; *Stebbins v. Palmer*, 1 Pick. 71; *Smith v. Sherman*, 4 Cush. 408. Aliter, if special damage to property is caused. *Finlay v. Chirney*; *Stebbins v. Palmer*.

has affected it. It matters not that an action may already have been set on foot,¹ the rule applies with absolute impartiality.

It has been suggested that the rule may have come into operation when the processes of the courts were finally putting aside the right of private redress for wrongs which had prevailed under what may be called customary law. ‘A process which is still felt to be a substitute for private war may seem incapable of being continued on behalf of or against a dead man’s estate.’² Whether this be true or not of cases of the death of the wrongdoer,—it would not explain the effect of death by the injured person,³—reasons were found even in early times which brought about legislation to limit any possible application of the rule to cases in which the tort directly affected the injured man’s property.⁴ Legislation of the kind began as early as the year 1330, which gave an action for ‘goods and chattels of . . . testators carried away in their life;’ and twenty-one years later the same right of action was given, by construction of statute, to administrators.⁵ These statutes have been adopted in America; and to

¹ Bowker *v.* Evans, *supra*, an arbitration.

² Pollock, *Torts*, 61, 6th ed., to which is added a dictum by Newton, C. J., from Year Book 19 Hen. 6, pl. 10 (A. D. 1440–1): ‘If one doth a trespass to me and dieth, the action is dead also, because it should be inconvenient to recover against one who was not party to the wrong.’

³ By the Roman law there was no action for damages for the killing, ‘quia in homine libero nulla corporis aestimatio fieri potest.’ Dig. 9, 3, 1, § 5. This has sometimes been said to be the reason for the rule in our law.

⁴ ‘The distinction seems to be between causes of action which affect the estate, and those which affect the person only. . . . According to this distinction, an action for the breach of a promise of marriage would not survive; for it is a contract merely personal; at least it does not necessarily affect property. . . . The injury complained of is violated faith, more resembling in substance deceit and fraud than a mere common breach of promise.’ Wilde, J., in Stebbins *v.* Palmer, 1 Pick. 71, 79. If it be said that the same is true of many other contracts which do survive, the only answer perhaps is, that a rule, like that of *actio personalis*, not founded in sound reason, will be apt to be departed from more or less.

⁵ 4 Edw. 3, c. 7; 25 Edw. 3, st. 5, c. 5. See Phillips *v.* Homfray, 24 Ch. Div. 439. The Roman law went further, being without limita-

them (as in England) have been added statutes, varying more or less in the different States, in favor of the nearest kindred of persons killed by misconduct of others. The latter statutes, however, have no place in a consideration of General Doctrine.

§ 16. ASSIGNABILITY OF ACTION FOR TORT.

Actions for tort not harmful to property are not assignable,¹ apart from statute.² Various reasons have been given, *Ground of rule.* the common one being that such actions are peculiarly personal. How, it is asked, can another represent one whose good name has been tarnished, or whose happiness has been ruined?³ Perhaps the explanation runs back to the time when torts had not yet detached themselves from crimes. Crimes of course were always personal; torts continued, after the separation, to be regarded as of the same nature, except where damage was done to property. It may also be noticed that things which are not descendible, as torts are not,⁴ are not ordinarily alienable. Torts however which harm property, as they survive, are assignable.⁵ So too are judgments in damages for tort.⁶

tion. ‘Est enim certissima iuris regula ex maleficiis pœnales actiones in heredem non transire nec dari solere veluti furti, vi bonorum raptorum, iniuriarum, damni iniuriæ.’ Gaius, iv. 112; Inst. iv. 12, 1; Dig. 47, 1, 1 pr.; Dig. 50, 17, 111, § 1.

¹ Weller *v.* Jersey City R. Co., 61 Atl. 459 (N. J. Ct. of Err.); Rice *v.* Stone, 1 Allen, 566; Stone *v.* Boston & M. R. Co., 7 Gray, 539; Howard *v.* Crowther, 8 M. & W. 603.

² McLaury *v.* Watelsky, 87 S. W. 1045, 13 Tex. Civ. App. 404.

³ See Rice *v.* Stone and Howard *v.* Crowther, *supra*.

⁴ *Supra*, § 15.

⁵ Rice *v.* Stone, *supra*.

⁶ Id.; Stone *v.* Boston & M. R. Co., 7 Gray, 539; Reynolds *v.* Cavanagh, 102 N. W. 986 (Mich.). As to verdicts see Rice *v.* Stone, *supra*.

§ 17. DIVISION OF SUBJECT: CULPABLE MIND AND INCOLPABLE MIND.

In accordance with the analysis of tort as summed up on a preceding page,¹ it will be seen that the subject readily divides itself into two parts, in one of which liability turns, apart from volition, upon a culpable state of mind, while in the other the state of mind is an irrelevant fact. The first part will accordingly include the cases which turn upon fraud, negligence, or malice; the second will include cases of illegal acts and acts done at peril. The division will then be designated thus:

- Part I. Culpable Mind.
- Part II. Inculpable Mind.

Liability for the consequences of conduct proceeding from a culpable state of mind falls so naturally into line with morals that one might suppose that Part I. explains itself on its face, and that only Part II. would call for Culpable mind in modern law: social conditions. explanation. But the inference would be wrong. As a matter of fact the subjects of fraud, negligence, and malice, as we have them to-day in tort, are of modern development. They are subjects in which the courts from the time of Lord Holt have been steadily increasing the burden of establishing liability. A new right of action for fraud (in the form of deceit) was indeed given in the time of Lord Kenyon,² by an extension of the law; but the old action of deceit, being an action of contract, was a simple remedy, while the new one was made so difficult as to impair its use-

¹ *Ante*, p. 35.

² *Pasley v. Freeman*, 3 T. R. 51 (1789). In the later development of this action it has come to be enough to prove intent good or bad. Still the case is one of false representation, and where a man has made such a representation it is fair to consider his conduct culpable, in a case in which he is liable, though he may intend a benefit. Contract of the kind needs no explanation.

fulness and finally to require legislative relief.¹ The action for malicious prosecution too was originally a simple action, requiring proof of acquittal and malice only; but Lord Holt added the hard requirement of proof of want of probable cause.² The action for negligence as a tort is of recent date, and has steadily become more and more difficult to maintain.³

The reason for all this must be sought in the varying social conditions of history. The case of malicious prosecution furnishes the clearest illustration; the lines there are well marked. The subject opens with statutes of the time of Edward the First, which need no comment. Great men were putting forward men of straw to prosecute unfounded charges in the king's courts, and 'lords of courts and others that keep courts . . . intending to grieve' the tenantry, were bringing false suits in the manor courts. The statutes referred to provided an easy remedy for the mischief, that the feudal lords might know the power of the king.⁴ But feudalism perished at Bosworth field, and Lord Holt might well declare the danger past and put a burden upon the plaintiff, in accordance with social pressure in his day. It is impossible to believe that Edward the First was governed by philanthropy or 'immutable principles,' and it is not easy to believe that Lord Holt was, in view of his opposition to the law merchant.⁵

As for actions for negligence, it is enough to notice that capital is apt to be the defendant in such cases; other cases may well follow. Such appears to be the actual, if unavowed, course of things.

¹ See *Derry v. Peek*, 14 App. Cas. 327, and the legislation which followed on the liability of directors. 53 & 54 Vict. c. 64.

² *Savill v. Roberts*, Lord Raym. 374 (1699).

³ See The Green Bag for January, 1907, pp. 29, 30, The Modern Conception of Animus, an illuminating article by Brooks Adams, Esq.

⁴ Stats. 13 Edw. 1, cc. 12, 36; also 52 Hen. 3, c. 1.

⁵ This was considered universal law, if not 'natural' law; Lord Holt was for the common law, which was essentially feudal. But Lord Holt was at the parting of the ways, and the law vacillated in his hands.

Explanation of liability for conduct proceeding from an inculpable state of mind, so plainly called for at first suggestion, is now not far to seek. The earlier wrongs were trespass, to the person or to property. If to the person, they were likely to be redressed on the spot, and the courts would not and could not, in the social atmosphere which always surrounds such cases,¹ put a hindrance in the way of a legal remedy. As for trespass to property, the fact has been pointed out, that the act was usually that of tenant against landlord; the landlord would not go to the expense of making fences, and having the power to make the law he made it his own way — the tenant must keep on his own land.² To have required proof of a culpable mind would have compelled the landlord to fence his lands. Trespass to goods followed in the same path, and so did trover.

Of modern actions the sufficient illustration is what is going on to-day, in the contest between capital and labor, and between both and the public. Actions which a few years ago would not have been sustained — the courts then requiring proof of wrongful means — are now of familiar occurrence. Capital or the public, it may not always be clear which, has made its power felt, and the resultant of the struggle has appeared accordingly. The remedy is given not only without proof of the use of wrongful means, but without proof of a culpable state of mind.³

It remains now to analyze the subject of this chapter and show how general doctrine is worked out in the particular torts of the law.

¹ Compare a recent Louisiana case, thought to be opposed to all precedent, but right notwithstanding on the ground of the text. *Masset v. Keff*, 41 So. Rep. 330. See *Columbia Law Rev.*, December, 1906, pp. 581, 582.

² *The Green Bag*, ut supra, at pp. 26, 27.

³ See chapter vi.

SPECIFIC TORTS.

PART I.

CULPABLE MIND.

In the case of acts or omissions falling under this head the defendant's liability turns upon his special mental attitude (apart from volition in what was done or omitted).

WRONGFUL MEANS: FRAUD.

CHAPTER II.

DECEIT.

Statement of the duty. A owes to B the duty not to mislead him to his damage by false and fraudulent representations.

Deceit may be a ground of defence to the enforcement of a contract, and also a ground for proceedings by the injured party to rescind a contract. In such cases the Deceit in cases of contract. same facts, apart from the wrongdoer's knowledge of the actual state of things, are necessary for establishing the deceit as are necessary to an action of or for deceit.¹ Hence, with the exception mentioned, authorities concerning the proof of deceit in cases of contract are authorities in regard to actions for damages by reason of deceit.

The action at law for damages by reason of deceit is called indifferently an action *of* deceit or an action *for* deceit.

§ 1. WHAT MUST BE PROVED.

In order to establish a breach of the duty above stated, and to entitle B to civil redress therefor, B, unless he come within one of the qualifications to the rule, must make it appear to the court (1) that A has made a false representation of material facts; (2) that A made the same with knowledge of its falsity; (3) that B was ignorant of its falsity, and believed it to be true;

Five chief facts to be proved in ordinary cases.

¹ King *v.* Eagle Mills, 10 Allen, 548; Wilder *v.* De Cou, 18 Minn. 470.

(4) that it was made with intent that it should be acted upon by B; (5) that it was acted upon by B to his damage.¹ But each of these general elements of the right of redress must be separately examined and explained, and any qualifications to the same presented. The designation of the parties as A and B may now be dropped, and B will be spoken of as the plaintiff, and A as the defendant.

§ 2. THE REPRESENTATION.

Definition. It is proper first to consider the legal meaning of the term 'representation,' and thus to ascertain the real foundation of the action under consideration. Accordingly, a representation may be defined to be a statement or an act, creating a clear impression of fact upon the mind of another, sufficient to influence the conduct of a man of ordinary intelligence.

As a matter of language there may be no difference whatever between a representation and a warranty. The statement 'This horse is sound' may be the one or the other. The following external distinctions however will suggest certain tests for deciding cases to which they are applicable:

Representation distinguished from warranty. A warranty is always annexed to some contract and is part of that contract; the warranty is indeed a contract itself,² though a subsidiary one, dependent upon the main agreement. A representation however is in no case more than inducement to a contract; it is never part of one. To carry it into a contract would be to make it a warranty. And again, there may be a representa-

¹ *Pasley v. Freeman*, 3 T. R. 51; *Marshall v. Hubbard*, 117 U. S. 415; *Merwin v. Arbuckle*, 81 Ill. 501; *Riley v. Bell*, 120 Iowa, 618, 95 N. W. Rep. 170; *Atchison Bank v. Byers*, 139 Mo. 627, 41 S. W. Rep. 325; *Kountze v. Kennedy*, 147 N. Y. 124, 29 L. R. A. 360, 41 N. E. Rep. 414; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. Rep. 376; *Arthur v. Griswold*, 55 N. Y. 400, 410; *Dudley v. Minor*, 100 Va. 728, 42 S. E. Rep. 870.

² *Brownlie v. Campbell*, 5 App. Cas. 925, 953, Lord Blackburn. An affirmative warranty is ordinarily an artificial contract of the law.

tion, such as the law will take cognizance of, though no contract was made or attempted between the one who made the representation and the one to whom it was made.

This would be sufficient to distinguish the two terms, if it were necessary to a warranty that it should be expressly annexed to the contract-in-chief; but that is not necessary, and that fact sometimes creates difficulty. In written contracts there can seldom be difficulty in determining whether a particular statement is a warranty or a representation (when it is either), for the warranty must be part of the writing, since a warranty must be part of the contract-in-chief,¹ and it will either be directly incorporated into the general writing, or be so connected with it by apt language² that there can be no doubt of the intention of the parties.

The difficulty is with oral contracts, and then in most cases only in regard to sales of personality. Whether the statement in question is a representation or a warranty is however treated as a question of intention;³ and an intention to create a warranty is shown, it seems, by evidence of material statements of fact made as an inducement to the sale, at the time the bargain was effected, or during negotiations therefor which have been completed in proper reliance upon the statements;⁴ provided nothing at variance with the inference of intention is shown. If the statement was not so made, it is a representation if it is anything. What difficulty remains is in the

¹ *Kain v. Old*, 2 B. & C. 627.

² A warranty may indeed be implied, i. e. arise without language or intention, but such cases are aside from the present purpose. The difficulty under consideration concerns the effect of language used.

³ There may be no intention, in point of actual fact, to create a warranty; but as in other cases of mental facts, intention may be inferred beyond dispute by what was said or done.

⁴ See *Harrington v. Smith*, 138 Mass. 92, 98; *Hopkins v. Tanqueray*, 15 C. B. 130. This will explain many cases in which it is held that a vendor of personality is liable for his false representations though he believed them to be true. See *Sledge v. Scott*, 56 Ala. 202; post, p. 88, n. In such cases there is in reality a warranty, and hence the vendor's knowledge is immaterial, though the case is not always put on the ground of warranty.

application of the rule; and that is a matter for works treating of contracts or warranty in detail.

A warranty of fact however, when broken, may be treated, it seems, as a case of misrepresentation, giving rise to an action for deceit, if the elements necessary to liability in a proper case of misrepresentation are present;¹ and this, it is believed, is true whether the warranty was express or implied. Indeed, in case of

Warranty treated as representation. implied warranty the breach may possibly be enough to make the case one of deceit.² This reduces the matter to a question of the form of action. But it is very doubtful whether an action based on deceit could be maintained where the evidence showed nothing but a breach of warranty.³ That would, in the language of pleading, be a variance; the action should be on the warranty as such.

Consider now the definition above given of the term 'representation.' A representation must consist in a 'statement or an act.' There are, it is true, cases in which legal consequences may attend absolute silence; but there are very few cases⁴ in which an action for damages on account of silence alone can be maintained. There must ordinarily be some additional element to make silence actionable. If the silence consists in withholding part of the truth of a statement, it may be actionable, as will be seen later; but in such a case silence is, properly speaking, only part of the representation.⁵ The silence

¹ See *Indianapolis R. Co. v. Tyng*, 63 N. Y. 653.

² *White v. Madison*, 26 N. Y. 117, 124; *Jefts v. York*, 10 *Cush.* 392; *Johnson v. Smith*, 21 Conn. 627; *Collen v. Wright*, 8 *El. & B.* 647; *Randell v. Trimen*, 18 C. B. 786; *Seton v. Lafone*, 18 Q. B. D. 139, affirmed on appeal, 19 Q. B. D. 68; post, p. 89.

³ *Mahurin v. Harding*, 28 N. H. 128; *Cooper v. Landon*, 102 Mass. 58; *Larey v. Taliafferro*, 57 Ga. 443.

⁴ Silence might be ground for an action in deceit by a cestui que trust against his trustee, it seems, in a transaction between the two in regard to the trust property to the damage of the former.

⁵ When *concealment* may amount to a representation, see *Stewart v. Wyoming Ranch Co.*, 128 U. S. 383.

amounts to saying that what has been stated is all. There is a duty to speak in such a case, and it is only when there is such a duty that silence has any legal significance.¹

Indeed, even passive concealment, that is, intentional withholding of information, when not attended with any active conduct tending to mislead, is insufficient, according to the general current of common-law authority, to create a cause of action. For example: The defendant, knowing of the existence of facts tending to enhance the price of tobacco, of which facts the plaintiff is ignorant to the defendant's knowledge, buys a quantity of tobacco of the plaintiff at current prices, withholding information of the facts referred to (no question being asked to bring them out). This is no breach of duty to the plaintiff.² Again: The defendant buys of the plaintiff land in which there is a mine, the defendant knowing the fact, and knowing that the plaintiff is ignorant of it. The defendant does not disclose the fact in the negotiations for the purchase. This is no breach of duty.³

¹ *Jordan v. Pickett*, 78 Ala. 331, 338; *Crowell v. Jackson*, 53 N. J. 656, 23 Atl. Rep. 426; *Iron City Bank v. Du Puy*, 194 Penn. St. 205, 44 Atl. Rep. 1066.

² *Laidlaw v. Organ*, 2 Wheat. 178. See *Prescott v. Wright*, 4 Gray, 461, 464; *Kintzing v. McElrath*, 5 Barr, 467; *Smith v. Countryman*, 30 N. Y. 655, 670, 671; *People's Bank v. Bogart*, 81 N. Y. 101; *Hanson v. Edgerley*, 29 N. H. 343; *Fisher v. Budlong*, 10 R. I. 525, 527; *Hadley v. Clinton Importing Co.*, 13 Ohio St. 502; *Williams v. Spurr*, 24 Mich. 335; *Law v. Grant*, 37 Wis. 548; *Cogel v. Kinsey*, 89 Ill. 598; *Frenzel v. Miller*, 37 Ind. 1; *Smith v. Hughes*, L. R. 6 Q. B. 597; *Evans v. Carrington*, 2 De G. F. & J. 481; *Peek v. Gurney*, L. R. 9 H. L. 377, Lord Cairns; *Coaks v. Boswell*, 11 App. Cas. 232, Lord Selborne. 'Whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.' *Blackburn*, J., in *Smith v. Hughes*, *supra*. Contra in some of the States. *Patterson v. Kirkland*, 34 Miss. 423; *Cecil v. Spurgur*, 32 Mo. 462; *Lunn v. Shermer*, 93 N. Car. 164; *Merritt v. Robinson*, 35 Ark. 483.

³ *Fox v. Mackreth*, 2 Bro. C. C. 400, 420, a leading case in equity. See *Turner v. Harvey, Jacobs*, 169, 178, Lord Eldon.

An act however, attending what would otherwise be a case of perfect silence in regard to the fact in question, may have the effect to create a representation, and lay the foundation, so far, for an action;¹ but the act must be significant and misleading.² For that purpose however it may be slight;³ a nod of the head may no doubt be enough, so may a withdrawing of attention from some point to which it is being or about to be directed.

To make a representation, the statement or act must create a 'clear impression';⁴ the plaintiff does not make out the alleged Clear impres- breach of duty if his evidence shows only a state-
sion. ment or act of vague or indefinite import. Such statements or acts would have little effect upon a man of average intelligence; and hence, whatever the actual effect produced in a particular case, the law takes no notice of them. But this assumes that the statement or act cannot, because of its nature, operate as a fraud.

The representation need not however be created by language; there is no distinction between an impression created Words not by words and one created by acts.⁴ Language is necessary. only one of the means of conveying thought. A thought may often be conveyed as distinctly by an act; enough, so far, that a clear impression is created upon the mind. If the impression is capable of being stated as a fact, and is such as might govern the conduct of an average man in regard to some change of position in contemplation, it satisfies the rule.

It follows that, to constitute a representation, it is not necessary, even when language alone is used, that the statements should be made in terms expressly affirming the

¹ *Laidlaw v. Organ*, supra; *Hadley v. Clinton Importing Co.*, supra.

² *Id.*

³ *Turner v. Harvey, Jacob*, at p. 178.

⁴ *Leonard v. Springer*, 197 Ill. 532, 64 N. E. Rep. 299; *New York National Bank v. Curtis*, 2 N. Y. App. Div. 508; *Lobdell v. Baker*, 1 Met. 193; *Coolidge v. Brigham*, *id.* 547, 551; *Mizner v. Kussell*, 29 Mich. 229; *Paddock v. Strobridge*, 29 Vt. 470. These are cases of warranties, but the principle is the same.

existence of some fact. If the statement be such as would naturally lead the plaintiff, as a man of average intelligence, to suppose the existence of a particular state of facts, that is as much as if statements had so been made in exact terms.¹

It should be noticed that there is a difference in fact between vagueness and ambiguity. Vagueness, as we have seen, is fatal to the idea of a legal representation; but ambiguity in an impression may only mean that more than one fact has been impressed upon the mind, not that none at all has been left there. In such a case as this the only question that can arise in reason or in law is whether, assuming the facts impressed to be clear and definite, the plaintiff reasonably acted upon the one which was false. That he did this it devolves upon him to show. For example: The defendants issue a prospectus in regard to a company, in process of formation to take over certain iron works, which prospectus contains the following statement: 'The present value of the turnover or output of the entire works is a million pounds sterling per annum.' This statement might mean either that the works had actually turned out more than a million's worth at present prices within a year or yearly, or only that the works were capable of turning out so much; in the former case it is false, in the latter it might be true. The plaintiff, who has been induced to buy shares in the undertaking, must show that he acted upon the statement in the sense in which it was false.²

The impression created must be of a 'fact,'³ a word which imports something capable of being known. Does this mean, in the case of a statement, that what is stated must be stated as a fact? There is some confusion in the books in regard to this question. It is as fact.

¹ *Donovan v. Donovan*, 9 Allen, 140; *Rhode v. Alley*, 27 Texas, 443, 446; *Lee v. Jones*, 17 C. B. n. s. 482; s. c. 14 C. B. n. s. 386.

² *Smith v. Chadwick*, 9 App. Cas. 187; s. c. 20 Ch. Div. 27.

³ *Cloutman v. Bailey*, 62 N. H. 44; *Miles v. Pike Mining Co.*, 102 N. W. Rep. 555.

commonly said that the law takes no notice of statements of opinion, or of statements in regard to future events or conduct short of contract. But that is by no means universally true; and even when true its truth does not rest upon the ground that such statements are not statements of fact. As a matter of form it is true that statements of opinion and statements relating to the future ordinarily are not statements of fact; but in reality they always involve and imply statements of fact. The fact involved is indeed a *mental* fact, to wit, the state of mind — the opinion, belief, or intention — of the person speaking. But a mental fact is as truly a fact as a non-mental fact; the person making it knows whether it is true or false. He knows whether his belief or intention is as he has stated. Anything capable of being known is a fact, as the law looks upon the subject; and a mental fact is as capable of being known as a non-mental fact.

The result is that when a man states that his opinion, belief, or intention is so and so, he has virtually and in real effect stated that he knows of nothing to make his statement of opinion, belief, or intention a sham. If then the law requires that what is stated should be stated as a fact, the case in question fulfils the requirement; the statement is in effect — and that is the real test — a statement of fact. For example: The defendant, seller of a hotel under lease, says to the plaintiff, the buyer, that the tenant is a ‘most desirable tenant.’ Assuming that what is ‘desirable’ in such a case is matter of opinion, still the statement is in effect a statement of fact, for the seller ‘impliedly states that he knows facts which justify his opinion.’¹ Again: The defendant, a cattle dealer, selling cattle to the plaintiff, states that he is of opinion that the cattle will weigh 900 lbs. and upwards per head. This in effect is a statement of fact, to wit, that the defendant knows nothing to make the opinion a sham.²

¹ *Smith v. Land & House Corp.*, 28 Ch. Div. 7. See *McDonald v. Smith*, 139 Mich. 211, 222.

² *Birdsey v. Butterfield*, 34 Wis. 52.

These are cases of statements (in the form) of opinion; but it is obvious that statements in regard to the future stand upon the same footing. Thus, if a person were to say that a certain ship 'will arrive to-morrow,' that would amount to a statement that he knew nothing to the contrary, and hence would be a statement of fact. So a promise to pay for property bought imports a statement of intention to pay; and intention is a matter of fact,¹ though it is not agreed whether a false statement of intention, short of contract, can be made ground of an action.²

It is clear then that the contrast usually drawn or suggested is a false one.³ The true contrast is suggested by the following paragraph; it is between things, whether put as fact or as opinion, belief, or intention, which are persuasive of action, and things which are not.

The statement or act must be one 'sufficient to influence the conduct of a man of ordinary intelligence.'⁴ The meaning of this rule however, like that of the one just considered, is in some particulars a matter of doubt. Thus, in the sale of goods 'simplex commendatio non obligat.' But what is 'simplex commendatio'? A simple statement of value by a vendor is a clear case on the one hand; a plain statement of fact going to make up value, as the age of a horse, is an equally clear case on the other. But what of statements

False contrast
of fact and
opinion: the
true contrast.

What was
said or done
must have
been sufficient
to influence
conduct:
examples.

¹ See Karberg's Case, 1892, 3 Ch. 1, 11, Lindley, L. J.; Edgington *v.* Fitzmaurice, 29 Ch. D. 459, 483; French *v.* Ryan, 104 Mich. 625, 62 N. W. Rep. 1016; Garry *v.* Garry, 187 Mass. 62.

² In favor of the action see the two English cases cited in the last note. Contra see Kitson *v.* Farwell, 132 Ill. 327, 23 N. E. Rep. 1024.

³ See for instance McDonald *v.* Smith, *supra* (of the value of a medicine); American Bank *v.* Hammond, 25 Col. 367; Whiting *v.* Price, 169 Mass. 576; s. c. 172 Mass. 240 (statements relating to the value of a bond); Andrews *v.* Jackson, 168 Mass. 266; Stubbs *v.* Johnson, 127 Mass. 219 (a note, 'as good as gold'); Safford *v.* Grout, 120 Mass. 20.

⁴ Leonard *v.* Springer, 197 Ill. 532, 64 N. E. Rep. 299.

falling between the two extremes?¹ The question cannot be definitely answered; most of the cases that arise have to be determined upon the special facts attending them. That is to say, particular rules can seldom be framed to reach them, and general rules have only a remote bearing upon them.

One or two limited rules however have been laid down touching the subject. It has been declared by able courts,² and denied by others,³ that a vendor's false statements of what an article or a tract of land cost, or what at some time it has brought, or what has been offered for it, may come within the cognizance of the law like ordinary representations of fact. Some courts indeed have gone much further than denying this proposition.⁴ But it is generally agreed that such statements when made, not by the vendor, but by a stranger, may constitute actionable misrepresentations.⁵ For example: The defendant, not being the seller of the property, falsely states that a tannery has on a previous sale brought a certain price. This is a misrepresentation capable of sustaining an action.⁶

Further, it may be considered as settled law that statements of the income of property, or of the rental receipts

¹ The requirement that the statement or act must be sufficient to influence conduct, and its sufficiency if it does, cover the common case of one occupying a superior position for information, or of an expert, of which *Wilson v. Nichols*, 72 Conn. 173, is a late example.

² *Van Epps v. Harrison*, 5 Hill, 63; *Page v. Parker*, 43 N. H. 363; *Somers v. Richards*, 46 Vt. 170; *Ives v. Carter*, 24 Conn. 392; *McAleer v. Horsey*, 35 Md. 439; *McFadden v. Robinson*, 35 Ind. 24; *Morehead v. Eades*, 3 Bush, 121. The rule in these cases appears to be the better one.

³ *Medbury v. Watson*, 6 Met. 246; *Cooper v. Lovering*, 106 Mass. 79; *Martin v. Jordan*, 60 Maine, 531; *Bishop v. Small*, 63 Maine, 12.

⁴ *Holbrook v. Connor*, 60 Maine, 576, false statements concerning deposits of oil in lands, and that the lands were of great value for making oil, held mere opinion, by a majority.

⁵ *Kilgore v. Bruce*, 166 Mass. 136, 138; *Fairchild v. McMahon*, 139 N. Y. 290. As to 'such lying talk as dealers may indulge in with legal impunity,' the courts it seems have reached the limit of exemption. *Kilgore v. Bruce*, supra; *Way v. Ryther*, 165 Mass. 226.

⁶ *Medbury v. Watson*, 6 Met. 246.

of a leasehold estate to be sold, constitute representations of fact which may safely be acted upon. For example: The defendant, seller of a public-house, falsely tells the buyer, the plaintiff, that the receipts of the house have been £160 per month, and that the tap is let for £82 per annum, and two rooms for £27 per annum. This is a false representation sufficient to influence conduct, and not a mere statement of value.¹ So possibly if the statement were that the present 'value' of the property is a certain sum per year; for that might mean its annual return.²

Statements concerning the pecuniary condition of an individual, as for instance of the amount of property he owns, also stand upon a different footing from statements of value; they may govern conduct.³ For example: The defendant says to the plaintiff, 'F is pecuniarily responsible. You can safely trust him for goods to the amount of £3,000.' This is a representation of fact which may govern conduct.⁴

Again, to come within the notice of the law, the representation, if not made by a lawyer to a layman, or by a man professing familiarity with the law to one not familiar with it, must, it seems, be more than a mere representation of what the law is. The reason of this has sometimes been said to be that all men are presumed to know the law; '*ignorantia legis neminem excusat.*' But it may be doubted whether that is the true ground of the rule; if it were, misrepresentation of the law by one's legal counsel could hardly be made the foundation of any

Representations of the law.

¹ *Dobell v. Stevens*, 3 B. & C. 623; *Medbury v. Watson*, *supra*, at p. 260; *Kilgore v. Bruce*, *supra*; *Brown v. Castles*, 11 *Cush.* 348, 350; *Ellis v. Andrews*, 56 N. Y. 83, 86. See *Fuller v. Wilson*, 3 Q. B. 58; *Lysney v. Selby*, 2 *Ld. Raym.* 1118.

² See *Smith v. Chadwick*, 9 App. Cas. 187, ante, p. 79. But see *Ellis v. Andrews*, *ut supra*.

³ *Pasley v. Freeman*, 3 T. R. 51; *Brock v. Garson*, 117 Mich. 550. Such representations must now in many States be proved by writing signed by the party to be charged. See e. g. *Walker v. Russell*, 186 Mass. 69; *Bush v. Sprague*, 51 Mich. 41.

⁴ *Pasley v. Freeman*, *supra*.

liability. A better reason appears to be that the law is understood by all men to be a special branch of learning; and hence what one layman may say to another will seldom have the effect to alter conduct. But whatever the ground, the rule appears to be treated as settled. For example: The defendant misrepresents the legal effect of a contract which he thereby induces the plaintiff to enter into with him, both parties being laymen. The defendant is not liable in damages for the loss inflicted upon the plaintiff.¹

As the language above used, however, plainly implies, it is not broadly true that a misrepresentation of the law may not be ground for an action of deceit. If a person having superior means of knowing the law, and professing to know it, though not a lawyer and not professing to be, should knowingly give false information of it in order to influence the conduct of one ignorant of the same, there would (so far) be an actionable misrepresentation.² For example: An immigrant, lately arrived from abroad, meets an old citizen, who professes familiarity with the land titles of the country, and proposes to sell land to him, to which he falsely assures the immigrant the title is good. This is a misrepresentation capable of sustaining an action.³

It is practically the same thing with saying that the statement or act should be sufficient to influence conduct, to say that it should be material; which latter is the usual way of stating the rule. But whichever way the rule is stated, it is

¹ *Upton v. Tribilcock*, 91 U. S. 45; *Taylor v. Buttrick*, 165 Mass. 547; *Busiere v. Reilly*, 189 Mass. 518; *Thompson v. Phoenix Ins. Co.*, 75 Maine, 55; *Duffany v. Ferguson*, 66 N. Y. 482; *Starr v. Bennett*, 5 Hill, 303; *Gormely v. South Side Gymnastic Assoc.*, 55 Wis. 350. See *Lewis v. Jones*, 4 B. & C. 506; *Beattie v. Ebury*, L. R. 7 Ch. 777, 804; *Eaglesfield v. Londonderry*, 4 Ch. Div. 693; *Jessel, M. R.*, explaining the nature of a representation of law. And see *West London Bank v. Kitson*, 13 Q. B. Div. 360, 363; *Bowen, L. J.* Misrepresentation of foreign law stands on the footing of misrepresentation of fact. *Bethell v. Bethell*, 92 Ind. 318; *Windram v. French*, 151 Mass. 547, 8 L. R. A. 750.

² *Busiere v. Reilly*, 189 Mass. 518; *Motherway v. Wall*, 168 Mass. 333; *Moreland v. Atchison*, 19 Texas, 303.

³ *Moreland v. Atchison*, 19 Texas, 303.

not to be understood that the law will not take notice of the case if influences from other sources may have operated upon the plaintiff. The only question upon this point is whether the representation made by the defendant was adequate to influence, and did influence, the plaintiff, not whether it was the sole inducement to the action taken; if it was sufficient to influence him, and did influence him to some real extent, that is enough. The courts will not be astute to find that one of several inducements present was not adequate to the damage.¹

Materiality,
what is suffi-
cient to influ-
ence conduct.

So far of the definition.

Further, it is for the plaintiff to show that the representation was false. But a representation is false in contemplation of law as well as of morals if it is false in a plain, practical sense; if, that is to say, it would be apt to create a false impression upon the mind of the average man.² For example: The prospectus of a company about to construct a railway describes the contract for the work as entered into at 'a price considered within the available capital of the company.' The fact is that there is a merely nominal capital of £500,000, and from this the sum of £50,000 is to be deducted for the purchase of the concession for making the railway, and the contract price for making it is £420,000. The representation is false; the term 'available capital' not being a true description of capital to be raised by borrowing.³

Falsity of the
representa-
tion.

¹ *James v. Hodsdon*, 46 Vt. 127; *Strong v. Strong*, 102 N. Y. 69; *Safford v. Grout*, 120 Mass. 20; *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. Rep. 188; *Braley v. Powers*, 92 Maine, 203, 42 Atl. Rep. 362; *Jordan v. Pickett*, 78 Ala. 331; *Dashiel v. Harshman*, 113 Iowa, 283, 85 N. W. Rep. 85; *Hale v. Philbrick*, 47 Iowa, 217; *McAleer v. Horsey*, 35 Md. 439; *Reynell v. Sprye*, 1 De G. M. & G. 660.

² A fraud may be as effectually perpetrated by telling the truth as a falsehood.' Lumpkin, J., in *Mulligan v. Bailey*, 28 Ga. 507, 510.

³ *Central Ry. Co. v. Kisch*, L. R. 2 H. L. 99. Another good example, *Smith v. Land and House Corporation*, 28 Ch. Div. 7.

An example in contrast with the foregoing may be stated. A prospectus of a company formed for buying a certain business declares that the price of purchase is a stated sum, and that no 'promotion money' is to be paid to the directors of the company for making the purchase. In fact the sum paid for the business is somewhat less than the sum stated in the prospectus, and shares of the stock representing the difference are now transferred, part to the directors of the company who effected the purchase, which part is afterwards transferred to the company on complaint, and part to the solicitors in the transaction. This is not misrepresentation.¹

The defendant cannot then escape liability by showing that the representation was, if literally taken, true, or true if taken in some forced or unnatural sense.² So too the defendant cannot rely upon the truth of the actual language used, when that is but part of the whole state of facts, and what was suppressed would, had it been stated, have given to the language used a contrary effect. If the part suppressed would have made the part stated false, there is a false representation.³ For example: The defendant, desirous of buying stock of the plaintiff, a lady, of the value of which he knows that she is ignorant, tells her of a fact calculated to depreciate the value of the stock, but omits to disclose to her other facts within his knowledge which would have given correct information upon the subject. This is a breach of duty to the plaintiff.⁴ Again: The plaintiff being about to supply the defendant's son with goods on credit, asks the defendant if the son has property to the value of £300, as the son has asserted. The defendant answers in the affirmative, stating

¹ *Arkwright v. Newbold*, 17 Ch. Div. 301. 'Nobody was ever lucky enough to sell a property without having some considerable deduction made out of the gross price, there being such persons as auctioneers and solicitors to be paid.' James, L. J.

² *Mizner v. Kussell*, 29 Mich. 229.

³ *Peek v. Gurney*, L. R. 6 H. L. 377, 403, Lord Cairns; *Central Ry. Co. v. Kisch*, L. R. 2 H. L. 99, 113.

⁴ *Mallory v. Leach*, 35 Vt. 156.

that he has advanced the sum to his son, but failing to state that his son has given his promissory note for the amount. This is a false representation, though true in a literal sense.¹

§ 3. DEFENDANT'S KNOWLEDGE OF FALSITY.

In order to entitle a plaintiff to recover damages for misrepresentation, it is necessary, by the more general current of authority, for him to prove that the defendant made the false representation fraudulently. A ^{Innocent mis-representation.} contract may, indeed, in many cases be rescinded, or its enforcement successfully resisted, for an innocent misrepresentation, that is to say for a false representation justifiably believed to be true at the outset by the party who made it;² but if damages are sought, fraud in some sense must, according to the general current of authority, be proved, whether at law or in equity.³ Negligence, by the weight of

¹ *Corbett v. Brown*, 8 Bing. 33; *Brock v. Garson*, 117 Mich. 550.

It is laid down too that if a representation, though true when made, afterwards, by change of facts, becomes false, to the knowledge of the person making it, he should communicate the fact to the other party, unless the latter knows or ought to know the truth. *Loewer v. Harris*, 57 Fed. Rep. 368.

² *Arkwright v. Newbold*, 17 Ch. Div. 301; *Redgrave v. Hurd*, 20 Ch. Div. 1; *Blackman v. Johnson*, 35 Ala. 252; *Sledge v. Scott*, 56 Ala. 202.

³ *Case v. Boughton*, 11 Wend. 106, 108; *Morgan v. Skiddy*, 62 N. Y. 319; *Cragie v. Hadley*, 99 N. Y. 131; *Code v. Cassiday*, 138 Mass. 437; *Bowker v. Delong*, 141 Mass. 315; *Mahurin v. Harding*, 28 N. H. 128; *Holdom v. Ayer*, 110 Ill. 448; *Lamm v. Port Deposit Assoc.*, 42 Md. 233; *Dunn v. White*, 63 Mo. 181; *Collins v. Jackson*, 54 Mich. 186; *Spangler v. Chapman*, 62 Iowa, 144; *Sims v. Eiland*, 56 Miss. 83 and 607; *Derry v. Peek*, 14 App. Cas. 237, reversing 37 Ch. Div. 541; *Joliffe v. Baker*, 11 Q. B. D. 255; *Arkwright v. Newbold*, 17 Ch. Div. 301, 320; *Redgrave v. Hurd*, 20 Ch. Div. 1; *Reese Mining Co. v. Smith*, L. R. 4 H. L. 64; *Childers v. Wooler*, 2 El. & E. 287; *Evans v. Edmonds*, 13 C. B. 777, 786. But see *Glaspie v. Keater*, 5 C. C. A. 474; *Lamberton v. Dunham*, 30 Atl. 716 (Penn.).

Proving the defendant's knowledge of the falsity of his representation is often called proving the 'scienter,' a term of the old common-law pleading.

authority, is not enough, unless there was a distinct duty to know¹ (of which presently).

Fraud as a technical term, within the meaning of this rule, or fraud in the narrower sense,² may be proved in one of three, and in some States in one of four ways, according to the nature of the case. It may be proved by showing (1) that the defendant made the representation with knowledge of its falsity; or (2) that he made it recklessly, without knowing whether it was true or false;³ or in some States (3) that he made it positively, or apparently as, of his own knowledge, when he only *believed* it to be true without having actual knowledge;⁴ or (4) that he made it under circumstances in which he was so specially related to the facts that it was his duty to know whether the representation was true or not.⁵

¹ *Le Lievre v. Gould*, 1893, 1 Q. B. 491; *Derry v. Peek*, 14 App. Cas. 327, and other cases in the last note. But see *Lambert v. Dunham*, 30 Atl. R. 716 (Penn.); *Glaspie v. Keater*, 5 C. C. A. 474. See a valuable article by Professor Smith, on Liability for Negligent Language, in the Harvard Law Review for November, 1900.

Some authorities give the action though the misrepresentation was innocent without falling within any of the qualifications to the more general rule of the scienter. *Foster v. Kennedy*, 38 Ala. 359, 81 Am. Dec. 56. A distinction is taken in Alabama between representations made by strangers to a transaction and representations made by a party; proof of fraud or the equivalent being required in the former case but not in the latter. *Einstein v. Marshall*, 58 Ala. 153.

² The mental aspect of the larger idea of fraud as a means, i. e. as misrepresentation. See *ante*, p. 18.

³ *Arnold v. Teel*, 182 Mass. 1; *Cahill v. Applegarth*, 98 Md. 493; *Miller v. John*, 208 Ill. 173, 70 N. E. Rep. 27; *Scholfield Pulley Co. v. Scholfield*, 71 Conn. 1, 40 Atl. Rep. 1046; *Mayer v. Salazar*, 84 Calif. 646; *Stone v. Covell*, 29 Mich. 359.

⁴ *Weeks v. Currier*, 172 Mass. 53, 55; *Scholfield Pulley Co. v. Scholfield*, 71 Conn. 1, 19; *Hadcock v. Osmer*, 153 N. Y. 604, 608; *Riley v. Bell*, 120 Iowa, 618, 95 N. W. Rep. 170; *Cabot v. Christie*, 42 Vt. 120, 126.

⁵ As to knowledge of falsity, that will be sufficient, as far as it goes, for any representation falling within the notice of the law. As to the second and third aspects of the case, see *Chatham v. Moffatt*, 147 Mass. 403, C. Allen, J.: 'The fraud consists in stating that the party knows

The fourth of these aspects of the case calls for a few remarks. There the defendant stands in a peculiar situation in regard to the facts; the facts are specially within his reach; they are not facts that others may, even by inquiry, know as well. The result is, that any representation made by him touching them is likely to carry great weight, greater, other things being equal, than representations made in other cases. This fact may indeed be held enough to govern his conduct, and to require him to know the truth of the representation; in a word, he may be held practically to have warranted the representation to be true, and, warranting it, he cannot require the party with whom he has dealt to prove that he knew it to be false when he made it.¹ Accordingly it is held that if a person assumes to act for another in a matter over which he has no authority, he renders himself liable for misrepresentation to the person whom he may thus have misled, though he may have honestly believed that he had the authority assumed.² The matter of

the thing to exist, when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge.' See Scholfield Pulley Co. v. Scholfield, 71 Conn. 1, 19. As to the English rule on this subject see Low v. Bouvierie, 1891, 3 Ch. 82. In the Connecticut case it is laid down that a groundless belief by the defendant will not save him.

The rule itself in regard to statements of one's own knowledge is not free from difficulties. Is not any positive assertion an assertion, in natural import, of knowledge? Is then proof of the falsity alone of a positive assertion sufficient proof on this head? So the cases must be driven to decide in upholding the rule.

¹ See Lord v. Goddard, 13 How. 198; White v. Madison, 26 N. Y. 117, 124; Jefts v. York, 10 Cush. 392, 396, Shaw, C. J.; Collen v. Wright, 8 El. & B. 647, Ex. Ch. See Denton v. Great Northern Railway Co., 5 El. & B. 860, in regard to representations by railway time tables.

² Conant v. Alvord, 166 Mass. 311; Jefts v. York, 10 Cush. 392, 396; White v. Madison, ut supra; Mahurin v. Harding, 28 N. H. 128; Noyes v. Lovering, 55 Maine, 403; Collen v. Wright, 8 El. & B. 647, 658; Coventry's Case, 1891, 1 Ch. 202, 211. The term 'warranty' here is conventional. See also Randell v. Trimen, 18 C. B. 786; Firbank v. Humphreys, 18

his authority was a fact peculiarly within his own means of knowledge, and it was therefore his duty to acquaint himself with the situation. The same may be said of a man's representation of his own power.¹ The whole subject has received wide interpretation in some cases.²

Cases falling under this phase of the subject appear however, apart from questions of authority, power, or agency, and cases of warranty,³ to stand upon narrow ground, and the principle of liability is not to be extended to cases not clearly within it. Thus the fact that a person allows his name to be used as director or trustee of a corporation or other company, in prospectuses containing false representations, does not impose upon him in law the duty to know the truth of the statements, and so subject him to liability. To prove such fact is not in any sense to prove fraud.⁴

What by the common law creates the duty to know the facts, in other cases than ordinary warranty, is a difficult question to answer. The following rule, laid down by an Irish judge, is all perhaps that the nature of the case permits: What a man must know, it was in substance declared, must have regard to his particular means of knowledge, and to the nature of the representation;

Q. B. D. 54 (more fully reported, 56 L. J. Q. B. 57); *Starkey v. Bank of England*, 1903, A. C. 114; *Seton v. Lafone*, 19 Q. B. D. 68. The majority in *Collen v. Wright* would, possibly, have agreed that an action for deceit could have been maintained. See *Jefts v. York*, *ut supra*, that the action should be in tort. The doctrine is extended to all transactions founded on representations of authority, whether of contract or not. *Starkey v. Bank of England*, *supra*.

Further see *Schuchhardt v. Allen*, 1 Wall. 359, 368; *Shippen v. Bowen*, 122 U. S. 575.

¹ *Doyle v. Hort*, 4 L. R. Ir. 661.

² See *May v. Western Union Tel. Co.*, 112 Mass. 90, which goes to the verge of interpretation. When the facts supposed to create the authority are fully stated, and no warranty is created, the plaintiff has taken his own risk. *Newmann v. Sylvester*, 42 Ind. 106.

³ See e. g. *French v. Vining*, 102 Mass. 132, sale of food for cattle; *Jeffery v. Bigelow*, 13 Wend. 518.

⁴ *Morgan v. Skiddy*, 62 N. Y. 319; *Western Bank v. Addie*, L. R. 1 H. L. Sc. 145.

and this must be subject to the test of the knowledge which a man, paying that attention which every one owes to his neighbor in making a representation to be acted upon, would have acquired in the particular case by the use of such means.¹

§ 4. PLAINTIFF'S IGNORANCE OF FALSITY.

The next element of the breach of duty is that requiring the plaintiff to show that he was ignorant of the ^{Ignorance and} truth of the matter concerning which the representation was made, and believed that it was true.

Both of these situations must, in general, be true of the plaintiff; he must have been ignorant of the true state of things, and have trusted the representation of them as made by the defendant. He must have been deceived; and to render the defendant liable, the plaintiff must have been deceived by the defendant. If the plaintiff had knowledge of the facts in question, or if without having knowledge thereof he acted upon independent information, and not upon a belief of the truth of the defendant's representation, he is in the one case not deceived at all,² and in the other is not deceived by the person of whom he complains.

It has often been laid down however that if the means of knowledge be equally open to both parties, the plaintiff, as a prudent man, must be deemed to have availed ^{Means of} knowledge himself of such means (or is not to be excused if he has not done so), and hence that, in contemplation of law, he has not been deceived by the defendant's misrepresentation; the result being that, unless there was a warranty, no action can be maintained.³ There is indeed no liability in

¹ Doyle *v.* Hort, 4 L. R. Ir. 661, 670, Palles, C. B.

² Hager *v.* Grossman, 31 Ind. 223; Tuck *v.* Downing, 76 Ill. 71; Whiting *v.* Hill, 23 Mich. 399.

³ Vernon *v.* Keys, 12 East, 632; Slaughter *v.* Gerson, 13 Wall. 379, dictum; Nesser *v.* Smith, 59 N. H. 41; Leavitt *v.* Fletcher, 60 N. H.

any case in which the party complained of has made no misrepresentation, has not been guilty of fraud of any kind, and has made no warranty. ‘Caveat emptor.’ But for the broad doctrine before stated, there is little support in the more recent specific adjudications upon the subject.

Some courts however have come to draw a distinction between means of knowledge *at hand* and general means of knowledge, in cases of misrepresentation; enforcing the doctrine in question where the means are at hand, so that by reasonable diligence the truth could be ascertained. For example: The plaintiff buys a quantity of manufactured rubber goods from the defendant at the defendant’s factory. The defendant makes false representations, but no warranty, in regard to the goods, and the plaintiff, because of the representations, does not examine them specially, though they are at hand and in condition to be examined. It is held that the plaintiff cannot recover damages.¹

Even this doctrine appears to go too far. It may be hard to believe that a plaintiff did not avail himself of means of knowledge directly at hand; but there is in principle only a probability of fact to be overcome. There is, by the better rule, no conclusion of law either that the plaintiff availed himself of the means, or that it was his duty to do so; the plaintiff may still show that he was misled by the defendant’s representation.² For example: A prospectus of a company

182; *Lytle v. Bird*, 3 Jones, 222; *Fields v. Rouse*, id. 72; *Harrington v. Paterson*, 124 Calif. 542 (rescission); *West End Co. v. Claiborne*, 97 Va. 734.

¹ *Salem Rubber Co. v. Adams*, 23 Pick. 256. See *Brown v. Leach*, 107 Mass. 364; *Whiting v. Price*, 172 Mass. 240, Holmes, J.: ‘But the requirement as it has been worked out [in Massachusetts] does not call for more than reasonable diligence.’ See also *Honsule v. Ruffin*, 172 Mass. 420; *West End Co. v. Claiborne*, 97 Va. 734.

² *Boddy v. Henry*, 126 Iowa, 31; *Mead v. Bunn*, 32 N. Y. 275, 280; *Schwenk v. Naylor*, 102 N. Y. 683; *Linington v. Strong*, 107 Ill. 295; *Weber v. Weber*, 47 Mich. 569; *West v. Wright*, 98 Ind. 335; *McClellan v. Scott*, 24 Wis. 81, 87; *Griffith v. Hanks*, 46 Texas, 217; *Central Ry. Co. v. Kisch*, L. R. 2 H. L. 99, 120; *Smith v. Land and House Corporation*, 28 Ch. Div. 7; *Redgrave v. Hurd*, 20 Ch. Div. 1, 13; *Reynell v. Sprye*, 1 De G.

in process of formation falsely states that the capital stock is a certain sum, and the plaintiff is induced by this statement to subscribe for shares of stock in the company. The plaintiff might have learned the true state of things by examining the records of the company, which were open to his inspection, but did not make the examination. He is not barred of redress.¹ Again: The defendant, vendor of land, makes to the plaintiff false representations concerning his title to the land. An examination of the public registry would disclose the truth. The plaintiff may rely upon the representations, and need not go to the registry.²

The subject may be further illustrated by a quite different sort of case. Every man is presumed to know the contents of a written contract signed by him; but no presumption of knowledge will stand in the way of a charge of misrepresentation or other fraud in regard to the contents of the writing.³ No doubt it would be imprudent not to read or to require the reading of an instrument before signing or accepting it; indeed, the courts would turn a deaf ear to a man who sought to get rid of a contract solely on the ground that its terms were not

Contents of
written in-
strument:
rescission.

M. & G. 668, 709; *Stanley v. McGauran*, 11 L. R. Ir. 314; *Sankey v. Alexander*, Ir. R. 9 Ex. 259, 316.

¹ *Central Ry. v. Kisch*, supra.

² *Parham v. Randolph*, 4 How. (Miss.) 435; *Kiefer v. Rogers*, 19 Minn. 32; *Holland v. Anderson*, 38 Mo. 55. See *Rhode v. Alley*, 27 Texas, 443.

Perhaps however, because of the time and expense possibly to be incurred, the registry would not be considered as at hand, so as to be immediately available for verification. A fortiori, of parties in Massachusetts in regard to the Patent Office at Washington. *David v. Park*, 103 Mass. 501. So too of a piece of land covered with snow: *Martin v. Jordan*, 60 Maine, 531; *Rhode v. Annis*, 75 Maine, 17; or flooded: *Jackson v. Armstrong*, 50 Mich. 65.

³ *McKindly v. Drew*, 71 Vt. 138, 41 Atl. Rep. 1039; *Dashiel v. Harshman*, 113 Iowa, 283, 85 N. W. Rep. 85; *Albany Inst. for Savings v. Burdick*, 87 N. Y. 40; *Robinson v. Glass*, 94 Ind. 211; *Hawkins v. Hawkins*, 50 Cal. 556; *Schuylkill v. Copley*, 67 Penn. St. 386; *Martindale v. Harris*, 26 Ohio St. 379; *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Stanley v. McGauran*, 11 L. R. Ir. 314.

what he supposed them to be. But the case would be different where a plaintiff charged fraud upon the defendant in reading the contract to him, or in stating its terms, or in secretly inserting terms not agreed upon.¹

The usual course of proceeding in regard to cases of the kind now under consideration is to rescind the contract;² but such a course may have become impossible.³ And whether it be possible or not, it is a well-established rule of law that one who has been induced by fraud to enter into a contract, whether executory or wholly (as by sale and payment) executed, may treat the contract as binding, retain its fruits, and sue for the fraud by which it was effected.⁴ Hence in the case of a written contract knowingly misread, misstated, or miswritten, the party wronged may probably maintain an action of deceit for the damage he may have incurred, while at the same time treating the contract as in itself valid.

But the defendant must have been guilty of fraud, as by knowingly misreading or misstating the instrument. Should he profess to state no more than the effect of a long writing, he could not, it seems, be liable in damages for a mistake; though equity would reform the instrument at the instance of the party injured.

The explanation of all this is not far to seek. It is not for a person who admits that he has been guilty of endeavoring to mislead another by misrepresentation, to say to him, when called to account, 'You ought not to have trusted me; you were negligent; you

¹ *Busiere v. Reilly*, 189 Mass. 518 (relief in equity); *Albany Inst. for Savings v. Burdick*, *supra*; *Stanley v. McGauran*, *supra*.

² *Busiere v. Reilly*, *supra*.

³ See *Clarke v. Dickson*, El. B. & E. 148.

⁴ *Strong v. Strong*, 102 N. Y. 69; *Gould v. Cayuga Bank*, 86 N. Y. 75; *Whitney v. Allaire*, 4 Denio, 554; s. c. 1 Comst. 305; *Mallory v. Leach*, 35 Vt. 158; *Clarke v. Dickson*, *supra*; *Regina v. Saddlers' Co.*, 10 H. L. Cas. 404, 421; *Western Bank v. Addie*, L. R. 1 H. L. Sc. 167.

ought to have made inquiry.¹ The law requires indeed the exercise of prudence by both parties; but that is all. If prudence on the one side has been disarmed by misrepresentation on the other, the law cannot justly refuse relief. Besides, the case of a plaintiff so situated is quite different from that of a defendant so related to the facts as to be bound to know the truth. In this latter case no one has misled the defendant; in the case under consideration the misrepresentation has, upon the hypothesis, misled the plaintiff.

The case is not varied in law by the circumstance that the plaintiff may have made some partial examination on his own behalf; if still he was misled, and prevented from making such examination as otherwise he would have made, he will be entitled, so far, to recover.² For example: Representations concerning a hotel about to be sold at auction are made by the seller in printed particulars of sale. The buyer, having seen the statements, sends his agent to look over the premises to see whether it will be advisable to buy. The agent goes accordingly, and having made examination, makes an unfavorable report; but the purchase is made. The buyer may show that he was induced by the representations of the seller to buy.³

The case will of course be different if the defendant's representation was not of a nature to mislead, as where it is a mere statement of value, or if it did not in fact mislead. And where the facts are open to the plaintiff equally with the defendant, it will no doubt be more difficult than in other cases for the plaintiff

¹ *Albany Inst. for Savings v. Burdick*, 87 N. Y. 40; *Smith v. Land and House Corporation*, 28 Ch. Div. 7; *Speed v. Hollinsworth*, 38 Pac. R. 496 (Kans.). But see *Brady v. Finn*, 162 Mass. 260; *Holst v. Stewart*, 161 Mass. 516; *Whiting v. Price*, 172 Mass. 240.

² *Smith v. Land and House Corporation*, 28 Ch. Div. 7; *Boddy v. Henry*, 126 Iowa, 31; *Starkweather v. Benjamin*, 32 Mich. 305. The Iowa and Michigan cases cited relate to acreage of land sold.

³ *Smith v. Land and House Corporation*, *supra*.

to show that he was prevented, by the representation made to him, from availing himself of the means of inquiry.

When the defendant induces the plaintiff to abstain from seeking information, mere concealment of material facts may become a breach of duty; and redress will not be refused in such a case merely because a sharp business man might not have been deceived. It is enough that the defendant has caused the plaintiff to refrain from examination.¹ Nor is the rule of law different when the defendant suggests examination to the plaintiff, but in such a way as to indicate that such a step would be quite unnecessary. For example: The defendant, in selling to the plaintiff property at a distance, suggests to the plaintiff that he go and look at the property, 'as their judgment might not agree, and, if not satisfied, he would pay the plaintiff's expenses, but if satisfied the plaintiff should pay them himself.' This is deemed to justify the plaintiff in acting upon the defendant's representations without examining the property.²

Even though a party sell at the risk of the purchaser, 'with all faults,' as he may, he will have no right to practise ~~Sale with~~ fraud; and if he should do so he will be liable as ~~faults.~~ for a breach of his legal duty to the purchaser. For example: The defendant sells to the plaintiff a vessel, 'hull, masts, yards, standing and running rigging, with all faults, as they now lie.' He however makes a false statement, that the 'hull is nearly as good as when launched,' and takes means to conceal defects which he knew to exist. This is a breach of duty to the plaintiff.³ But the case would

¹ *Schumaker v. Mather*, 133 N. Y. 590; *Starkweather v. Benjamin*, 32 Mich. 305; *Antle v. Sexton*, 137 Ill. 410, 27 N. E. Rep. 691; *Merguire v. O'Donnell*, 103 Calif. 50, 36 Pac. Rep. 1033.

² *Webster v. Bailey*, 31 Mich. 36.

³ *Schneider v. Heath*, 3 Campb. 506. See *Whitney v. Boardman*, 118 Mass. 242, 247; *George v. Johnson*, 6 Humph. 36.

be different if the seller, though aware of the defects, should do nothing to conceal them.¹

When the parties, by reason of physical or mental infirmity on the one side, or of the fact that the one party is in the occupation or management of the other's business, or has the general custody of his body, do not stand upon an equal footing, the objection to a suit for false representations, that the party to whom they were made was negligent in not making inquiry or examination, has still less force. Examples of this class of cases may readily be found in the case of transactions with aged persons, or with cestuis que trust by trustees, or with wards by guardians.² The rule of caveat emptor in sales does not apply to such cases; misrepresentation of value and other matters of opinion, traders' talk and the like, accordingly fall within the law and become actionable.³ Indeed the courts will protect any one against misrepresentations, made by designing men professing superior knowledge of the facts or of the law⁴ in question, to persons not having or supposed to have acquaintance with the facts or the law, and relying to their hurt upon the representations.⁵

Not even the subsequent acts of accepting and paying for goods upon delivery will bar the purchaser of redress, though the goods were open to his inspection at the time, if the fraud was not then discovered, and especially if such acceptance

¹ *Baglehole v. Walters*, 3 Campb. 154 (overruling *Mellish v. Motteux*, Peake, 156); *Pickering v. Dowson*, 4 Taunt. 779; *Bywater v. Richardson*, 1 Ad. & E. 508.

² See ante, p. 84.

³ *Shelton v. Healy*, 74 Conn. 265, 50 Atl. Rep. 742; *Nolte v. Reichelou*, 96 Ill. 425; *Hauk v. Brownell*, 120 Ill. 161; *Stoney Creek Woolen Co. v. Smalley*, 111 Mich. 321, 69 N. W. Rep. 722; *Kilgore v. Bruce*, 166 Mass. 136, 44 N. E. Rep. 108.

⁴ *Busiere v. Reilly*, 189 Mass. 518, 521; *Haviland v. Willets*, 141 N. Y. 35; *Berry v. Whitney*, 40 Mich. 65, 72.

⁵ *Dawe v. Morris*, 149 Mass. 188, 191; *Kilgore v. Bruce*, 166 Mass. 136, 138; *Moreland v. Atchison*, 19 Texas, 303.

and payment were procured by fraudulent artifices on the part of the vendor.¹ For example: The defendant, a manufacturer and vendor of tobacco, knowingly uses

Acceptance of goods sold in fraud of buyer. damaged tobacco in the manufacture, and intentionally uses boxes of green lumber; and while

the tobacco is being made up he exhibits to the plaintiff from time to time, in order to mislead him, specimens of tobacco as of the kind he the (defendant) is supplying the plaintiff, when in fact the defendant is supplying him with a different and inferior kind. Notwithstanding acceptance of the goods and payment for them, the plaintiff is entitled to damages against the defendant.²

§ 5. INTENTION THAT THE REPRESENTATION SHOULD BE ACTED UPON.

In regard to that element of the breach of duty under consideration which requires the plaintiff to prove that the defendant intended his representation to be acted upon, it is to be observed that, while the rule is probably inflexible, its force appears chiefly in

Misrepresentation in regard to third persons. those cases in which the deception was practised with reference to a negotiation with a third person, and not with the defendant. In cases of that kind, an instance of which is found in false representations to the plaintiff of the solvency of a third person,³ it is plain that the transaction with such third person, though shown to have been caused by the defendant's false representation, affords no evidence of an intention in the defendant that the representation should be acted upon by the plaintiff. It would be perfectly consistent with mere evidence that the plaintiff acted upon the defendant's misrepresentation in a transaction with a third

¹ See *Clarke v. Dickson*, El. B. & E. 148.

² *McAroy v. Wright*, 25 Ind. 22. An act does not amount to the waiver of a wrong unless it be done with knowledge of the wrong.

³ *Pasley v. Freeman*, 3 T. R. 51.

person, that the defendant, though he knew the falsity of his representation, did not know, and had no reason to suppose, that the plaintiff would act upon it. The representation might, for all this, have been a mere idle falsehood, such as would not justify any one in acting upon it.

It follows that where a party complains of false representations, whereby he was caused to suffer damage in a transaction with some third person, it devolves upon him to give express evidence either that the defendant intended that he should act upon the representation, or the legal equivalent, that the plaintiff was justified in inferring such intention;¹ and that it is not enough to prove that the misrepresentation was made with knowledge of its falsity.²

When however the effect of the false representation was to bring the plaintiff into a business transaction with the defendant, the case is quite different. Proof of such a fact shows at once the intent of the defendant to induce the plaintiff to act upon the representation; and it follows that no evidence need be offered of an intention to that effect, or of reasonable ground to suppose an intention. The principle appears most frequently in cases of sales; the rule of law being, that if the plaintiff, the purchaser, establish the fact that the defendant, the vendor, knew that his representation was false, it is not necessary for the plaintiff to give further evidence to show that the defendant intended to induce the plaintiff to buy.³ For example: The defendant sells a horse to the plaintiff representing that it is sound, when he knows that it is not. Further evidence of intention is not necessary.⁴

Bargain between plaintiff and defendant.

¹ See *Freeman v. Cooke*, 2 Ex. 654; *Cornish v. Abington*, 4 H. & N. 549.

² See *Pasley v. Freeman*, 3 T. R. 51.

³ *Collins v. Denison*, 12 Met. 549; *Claflin v. Commonwealth Ins. Co.*, 110 U. S. 81; *Johnson v. Wallower*, 15 Minn. 474; s. c. 18 Minn. 288; *Foster v. Charles*, 6 Bing. 396; s. c. 7 Bing. 105; *Polhill v. Walter*, 3 B. & Ad. 114.

⁴ *Collins v. Denison*, *supra*.

Indeed, it is not necessary in any case, if the cause of action is carefully stated, that it should appear that the defendant intended to *injure* the plaintiff. It has already been stated that a person honestly professing to have authority to act for another is liable as if for fraud for the damages sustained, if he has not the authority.¹ In such cases it is obvious that the representation may have been made for the benefit of the plaintiff.² So too in cases in which the defendant has made the misrepresentation with knowledge of its falsity, it is plain that he may really have desired and expected that the plaintiff would derive a benefit from the transaction. The law requires proof of intention (or the equivalent), not because it is supposed to be necessary to prove a bad motive on the part of the defendant, but to show that he understood the position of the plaintiff as a person likely to be misled. It is in that way only that intention is an element in the breach of duty. Proof of malice will serve the purpose, but is not required.³ All that is required is that the defendant should have intended, or should reasonably be supposed to have intended, that the plaintiff should act upon the representation.

§ 6. ACTING UPON THE REPRESENTATION.

It is fundamental that the defendant's representation should have been acted upon by the plaintiff, and acted upon to his injury, to enable him to maintain an action for the alleged breach of duty.⁴ Indeed, fraudulent conduct or dishonesty of purpose, however explicit, will not afford a cause of action unless shown to be the very ground upon which the plaintiff acted to his damage.⁵ The *defendant* must have caused the damage,

¹ *Ante*, p. 89.

² See *Polhill v. Walter*, 3 B. & Ad. 114.

³ *Foster v. Charles*, 6 Bing. 396; s. c. 7 Bing. 105.

⁴ *Pasley v. Freeman*, 3 T. R. 51; *Smith v. Chadwick*, 9 App. Cas. 187; *Freeman v. Venner*, 120 Mass. 424.

⁵ *Rutherford v. Williams*, 42 Mo. 18.

or contributed materially to it; for it need not have been the only cause.¹

So strong is the rule upon this subject, that it is deemed necessary to this action that the damage as well as the acting upon the representation must already have been suffered before the bringing of the suit, and that it is not sufficient that it may occur. For example: The defendant induces the plaintiff to indorse a promissory note before its maturity by means of false and fraudulent representations. An action therefor cannot be maintained before the plaintiff has been compelled to pay the note.²

Indeed a person who has been prevented from effecting an attachment upon property by the fraudulent representations of the owner or of his agent is deemed to have suffered no legal damage thereby, though subsequently another creditor attach the whole property of the debtor and sell it upon execution to satisfy his own debt.³ The person thus deceived, having acquired no lien upon or right in the property, cannot lose any by reason of the deceit. The most that can be said of such a case, it has been observed, is that the party intended to attach the property, and that this intention has been frustrated;⁴ and it could not be certainly known that that intention would have been carried out.⁵ If the attachment had been already levied and was then lost through the deceit, the rule would of course be different.⁶

¹ *Ante*, p. 85.

² *Freeman v. Venner*, 120 Mass. 424. See *Briggs v. Bushaber*, 43 Mich. 330.

What constitutes damage in a suit for deceit in sales will depend upon the particular rule whether the buyer is entitled to the benefit of his bargain or only to the difference between the actual value of the property and the price paid for it. See on the one hand, *Medbury v. Watson*, 6 Met. 246; *Kilgore v. Bruce*, 166 Mass. 136, 139; *Johnson v. Gravitt*, 114 Iowa, 183, 86 N. W. Rep. 256, and on the other, *Alden v. Wright*, 47 Minn. 225; *Shaw v. Gilbert*, 111 Wis. 165.

³ *Bradley v. Fuller*, 118 Mass. 239. But see *Kelsey v. Murphy*, 26 Penn. St. 78.

⁴ *Id.*; *Lamb v. Stone*, 11 Pick. 527.

⁵ *Bradley v. Fuller*, *supra*.

⁶ *Id.*

It must appear moreover that the *plaintiff* was entitled to act upon the representation; and this will depend upon the intention, or the reasonably presumed intention, of the defendant. The representation may have been intended for (1) one particular individual only (in which case he alone is entitled to act upon it), or (2) it may have been intended for any one of a class, or (3) for any one of the public, or (4) it may have been made to one person to be communicated by him to another. Any one so intended, who has acted upon the misrepresentation to his damage, will be entitled to redress for any damage sustained by acting upon the representation.¹ For example: The defendants put forth a prospectus to the public, containing false representations, for the purpose of selling shares of stock in their company. The plaintiff, as one of the public, may show that he acted upon the representations, and, having bought stock accordingly, recover damages for the loss sustained thereby.²

. § 7. KINDRED WRONGS: QUASI-DECEIT: UNFAIR COMPETITION.

We come now to certain kindred wrongs, which may be called quasi-deceit. These vary somewhat in legal aspect from deceit proper as presented in the foregoing pages, and yet they have enough in common with that subject to be treated as kindred to it. The subjects referred to are (1) the simulation of another's 'trade name' or business sign, and (2) disparaging statements of another's property, otherwise called Slander of Title. But Slander of Title introduces malice, and is a distinct tort; it will accordingly have a separate chapter.

¹ Richardson *v.* Silvester, L. R. 9 Q. B. 34; Swift *v.* Winterbotham, L. R. 8 Q. B. 244; Peek *v.* Gurney, L. R. 6 H. L. 377.

² Andrews *v.* Mockford, 1896, 1 Q. B. 372, distinguishing Peek *v.* Gurney, L. R. 6 H. L. 377. See also New York R. Co. *v.* Schuyler, 34 N. Y. 30; Bruff *v.* Mali, 36 N. Y. 200, 205.

A trademark proper is a mark or device, registered under statute, to identify a man's goods offered for sale or not. The owner of a valid statutory trademark has *property* in the same, with right of protection accordingly; his right accordingly does not turn upon the practice of fraud, or anything in the nature of fraud, and hence is not a subject for consideration here.¹ By 'trade name' is meant a name, mark, or device not registered according to statute and not a subject of property in the plaintiff. No action therefore can be based upon any infringement of a property right; there must be simulation, together with deception, practised by the defendant on the public against the plaintiff.² The wrong is often called 'unfair competition.' The trade name or mark may be one already in use and known to the trade as the name or mark of a particular person, or it may be new.

In order to sustain an action for *damages* for alleged wrongful use of a trade name, the plaintiff must show (1) that the trade name used by the defendant so resembled that of the plaintiff as to be likely to deceive the ordinary buyer, (2) that the defendant knew of the existence of the plaintiff's mark when he committed the alleged wrong, (3) that he intended to palm off the goods as the goods of the plaintiff, and (4) that the public were deceived thereby to the plaintiff's hurt.³ For example: The defendant sells a medicine labelled 'Dr. Johnson's oint-

What must
be proved in
the case of a
trade name.

¹ See post, p. 419.

² See *Reddaway v. Banham*, 1896, A. C. 199; *Ratcliffe v. Evans*, 1892 2 Q. B. 524, 528, as to damage.

³ *Sykes v. Sykes*, 3 B. & C. 541; *Rodgers v. Nowill*, 5 C. B. 109; *Morrison v. Salmon*, 2 Man. & G. 385; *Crawshay v. Thompson*, 4 Man. & G. 357, 379, 383. See *Bigelow, Fraud*, i. 560, 565. In a proceeding for *injunction* it is not necessary, even in these cases of quasi-trademark, to prove the defendant's knowledge or intent to deceive. Simple priority of use of the mark is enough. See *Millington v. Fox*, 3 Mylne & C. 338; *Singer Machine Co. v. Wilson*, 3 App. Cas. 376; *Reddaway v. Bentham Hemp-spinning Co.*, 1892, 2 Q. B. 639, 644, 646. The subject of trademarks is being assimilated to the law of property, as trademarks proper are taking the place of mere trade names; and actions for deceit are becoming infrequent.

ment;’ the label being one which the plaintiff had previously used and was still using when the defendant began to make use of the same. The plaintiff cannot recover without showing that the defendant has used the label for the purpose of indicating that the medicine has been prepared by the plaintiff.¹ Again: The plaintiff Sykes is a maker of powder-flasks and shot-belts, upon which he has placed the words ‘Sykes Patent.’ There is no valid patent upon them, in fact, as has been decided by the courts; but the maker has continued to use the words upon the goods to designate them as of his own making. The defendant, whose name is also Sykes, makes similar goods, and puts upon them the same words, with a stamp closely resembling that of the plaintiff, and thus sells the goods ‘as and for’ the plaintiff’s goods. This is actionable.²

If the case be one of alleged wrongful conduct in the use of a business sign or badge likely to deceive, the proof required will be the same, except that, instead of the ‘palming off’ under (3), the plaintiff, to recover damages, must show that the defendant intended to represent that the business which he was carrying on was the plaintiff’s business, or business in which the plaintiff had some special interest. For example: The defendant has the words ‘Revere House’ painted upon coaches which he uses to carry passengers from the railroad station to a hotel of the name. By contract with the proprietor of the hotel, the plaintiff has the exclusive right to represent that he has the patronage of the hotel. The defendant commits no breach of duty to the plaintiff, unless he so makes use of the designation as to indicate that the proprietor of the hotel has granted to him what has been granted to the plaintiff alone.³

¹ *Singleton v. Bolton*, 3 Doug. 293. This supposes, of course, that the medicine was not patented.

² *Sykes v. Sykes*, *supra*.

³ *Marsh v. Billings*, 7 *Cush.* 322. When an *injunction* merely is asked for by one who has lawfully had use of an unregistered name or mark,

known to the trade, it is not necessary, any more than it is of the case of a legal, registered trademark, for such one to prove an intent on the part of the defendant to palm off his goods as the goods of the plaintiff; enough that the name or mark adopted by the defendant, from resembling that of the plaintiff, will be likely to deceive the ordinary buyer. Or to put it in language quoted and approved by the Circuit Court of Appeals of the United States: 'When such a mark, name, or phrase has been so used by a person in connection with his business or articles of merchandise as to become identified therewith and indicate to the public that such articles emanate from him, the law will prohibit others from using it in such a way as to lead purchasers to believe that the articles they sell are his, or as to obtain the benefit of the market he has built up thereunder.' *Fuller v. Huff*, 104 Fed. Rep. 141, 143.

The same name or mark, so in use, may indeed be used by others, if it be not a true trademark of the statute; but in that case there must be a plain designation that the name or mark is that of the person using it, and not that of the plaintiff. *Powell v. Birmingham Vinegar Co.*, 1894, 3 Ch. 449, 461; affirmed, 1897, A. C. 710.

CULPABLE ACCIDENT.

CHAPTER III.

NEGLIGENCE.

Statement of the duty. A, seeing or knowing, or being in a situation to see or know, that acts or omissions of his, in failing to exercise ordinary care, skill, or diligence towards B, in a particular place or juncture, will be apt to do harm to B, owes to B the duty not to be guilty of such acts or omissions, to the damage of B.

The foregoing is a statement of duty, not for negligence universally, but for its more common forms. It would be impracticable to go further without making the statement prolix. It should be noticed that negligence may be predicated of acts as well as of omissions.

Like fraud and malice, negligence is only an element of tort, not itself a tort; it is wrongful, but not alone a wrong.¹

The harm complained of in actions for negligence follows some wrongful act or omission, often after considerable interval, as a mere event; and further the harm is never intended.²

§ 1. WHAT MUST BE PROVED.

A man may sustain damage by reason of the negligence of another, and yet have no right of action for the same. Another element is necessary; namely, that the defendant owed a duty to the *plaintiff* not to be negligent;³ this on the footing either that damage to him was

¹ *Ante*, p. 17, note.

² *Ante*, p. 19. Of course a man *might* in fact intend the harmful consequences of his negligence; but the case would then belong to the category of intended wrongs.

³ *Severy v. Nickerson*, 120 Mass. 306; *Sutton v. N. Y. Central R. Co.*, 66 N. Y. 243; *Miller v. Woodhead*, 104 N. Y. 471; *Kahl v. Love*, 37 N. J.

contemplated or that it resulted to him as one likely in the eye of the law to suffer. The rule is not peculiar to negligence,¹ but it needs emphasis here. Negligence, breach of duty to the plaintiff, and damage, are then the essential elements of the right of action. In many cases the duty will be obvious on the general facts, and hence will not call for special consideration; in other cases it will not be obvious that there was a duty, or what the nature of the duty was. Such cases will call for examination of the question.

The result is, that it will be necessary to consider, first, the meaning of 'negligence,' as applicable to all cases in general, and, secondly, assuming negligence, whether the negligence (and damage) amounted to a breach of duty to the plaintiff.

§ 2. LEGAL CONCEPTION OF NEGLIGENCE IN GENERAL.

Negligence in the law is a technical term, and a complex conception. Conduct is considered negligent in law which might not be considered negligent in the popular acceptance of the term. Indeed the popular understanding is too apt to make its way, in unguarded or mistaken language, into the law books, — some special phase of the subject in its technical sense being spoken of perhaps as something other than negligence.

Popular and legal meaning of negligence: rashness and wantonness.

The significance of this will be seen when it is said that negligence, in the eye of the law, embraces not merely want of care, its more familiar form, and thoughtlessness, but rashness and wantonness, in other words, danger known but disregarded or not heeded.² And well enough; for what are

5; *Delaware R. Co. v. Reich*, 61 N. J. 635; *Fitzpatrick v. Cumberland Glass Co.*, id. 378; *Hargreaves v. Deacon*, 25 Mich. 1; *Buch v. Amory Co.*, 69 N. H. 257; *Membury v. Great Western Ry. Co.*, 14 App. Cas. 179, 190.

¹ *Ante*, p. 37.

² See *Claridge v. So. Staffordshire Tramway Co.*, 1892, 1 Q. B. 422,

rashness and wantonness but failure, in presence of danger, to respond to the prompting of judgment or conscience, which, in the one case (rashness), would not tolerate over-confidence, and, in the other (wantonness), want of ordinary regard for another's rights.¹ Plainly that would be negligence.² But rashness and wantonness stand upon a special footing in certain cases, sometimes creating liability, as will later appear, when negligence in the more common form would not.³ That fact, no doubt, has caused judges and writers on law, now and then, too readily to consider rashness as not negligence at all.⁴

Legally speaking then, negligence in common form, as a tort, imports misconduct causing unintended harm,⁵ the misconduct consisting in a failure to respond to

Manifestation of conduct the test. judgment or conscience according to ordinary standards of conduct. Still, it should be observed that the law acts, or refuses to act, in accordance with the *manifestation* of conduct; conduct being the evidence of negligence. The law does not, except by such manifestation,

fast driving ; Banks *v.* Braman, 188 Mass. 367 ; Maynard *v.* Boston R. Co., 115 Mass. 457. Rashness, recklessness, and wantonness are words applied indifferently, in many cases, to danger known but not heeded ; but rashness properly is over-confidence, and recklessness or wantonness, disregard of another's rights. See for instance Banks *v.* Braman, *supra* ; Southern Ry. Co. *v.* Bush, 122 Ala. 470 ; Louisville R. Co. *v.* Orr, 121 Ala. 489 ; Louisville R. Co. *v.* Brown, *id.* 221 ; Abrahams *v.* Los Angeles Traction Co., 124 Calif. 411. All three approach, but still fall short of, intentional wrongdoing. They are however treated as evidence of malice and trespass as well as of negligence. Rashness and recklessness are also evidence in deceit, on the allegation of fraud. See *ante*, p. 88.

¹ If the function itself is so dulled as not to speak, it is a case of mental derangement, more or less, and may not be negligence.

² Bjornquist *v.* Boston & Albany R., 185 Mass. 130 ; Aiken *v.* Holyoke Street Ry., 184 Mass. 269 ; Banks *v.* Braman, 188 Mass. 367 ; Louisville R. Co. *v.* Anchors, 114 Ala. 492 ; Louisville R. Co. *v.* Barker, 96 Ala. 435.

³ *Supra*, p. 107, and note.

⁴ See e. g. Smith *v.* Baker, 1891, A. C. 325, 347, Lord Bramwell ; Terre Haute R. Co. *v.* Graham, 95 Ind. 286 ; Louisville R. Co. *v.* Bryan, 107 Ind. 51.

⁵ *Ante*, p. 19.

inquire into the defendant's attitude of mind to determine whether he was guilty. This however is not because negligence in the eye of the law is not in reality a state of the mind; it is because of the difficulty of getting at the state of mind and bringing it before the court as it really was, and the danger of relying upon direct evidence of it. The only safe way is to rely upon manifestations which *can* be depended upon; fixing upon some uniform standard as a common measure by which these manifestations may be judged for all cases suited to them. It must not then be supposed that because external standards are provided by which to determine questions of negligence, the law looks upon negligence as an exceptional factor in regard to mentality as the gauge of liability. The mind of the particular person might regard duty as too high or too low, hence the need of a common standard; but the question still is of the mind of a man of that standard. Mentality is the test. The point requires emphasis.

There are however certain anomalies. Insanity is an example. There are decisions, which must at present be accepted, that an insane person may be held liable for negligence,¹ for instance for damage due to a defective condition of his premises. Having the benefits of his land, he must, it is said, bear the burdens;² which is true as a matter of police regulation. The public would have the right to enter and repair and charge the cost to the estate. That would be true in any case. But in a suit for negligent conduct, that is, in a suit grounded upon negligence, conduct which would show negligence in the case of a normal person cannot rightly be said to show negligence in the case of one who is insane in the matter in question. Incapable of diligence, he cannot be capable of negligence.³

¹ *Morain v. Devlin*, 132 Mass. 87; *Brown v. Howe*, 9 Gray, 84; *Williams v. Hays*, 143 N. Y. 442; *Beals v. See*, 10 Barr, 56.

² *Morain v. Devlin*, *supra*.

³ See Wharton, Negligence, § 87, on the Roman law; Harvard Law Review, May, 1896, p. 65.

The notion of liability, whether for supposed negligence or other misconduct, may be an unconscious survival of the early idea that the mere doing of damage creates liability; unless it appears that the defendant, though insane in some particulars, was sufficiently sane in the matter in question to justify treating him as normal. Logic has little to say in the face of the wreckage of past and spent forces; logical or not, they stand until courts or legislatures sweep them aside; and that may be put out of the question by some dominant force in society, returning to former ideas.¹ Liability however has been put upon the ground that of two innocent persons he whose conduct occasioned the loss should be responsible;² a doubtful application of a doctrine at best difficult to apply and honeycombed with exceptions.

Further, negligence may relate either to things seen or known, or to things unseen or unknown; a man may fail in Negligence in duty by ignorance, when in conventional sense not seeing or his negligence may be called 'passive' negligence, as well as by knowledge, when his negligence may be called 'active' negligence.

Negligence in its common or typical form may now be defined. It consists in failure in the particular place or situation to conform to the conduct of a prudent, careful, skilful, or diligent man often called the average man; which failure,³ if it cause damage, is a breach of duty, unless the relation of the parties is modified by special facts. The definition has regard of course to one's conduct towards others, not to conduct in which others are not

¹ Suppose, for instance, that labor unionism should become dominant, would an employer sued civiliter for negligence be permitted to escape on the ground of insanity?

² *Williams v. Hays*, *supra*, at p. 447; *Beals v. See*, *supra*, at p. 61.

³ Other terms are 'fair man,' 'man of average intelligence,' 'man of ordinary intelligence or care, skill, or prudence,' and the like, according to the particular case.

concerned; for conduct may be prudent, careful, skilful, diligent, and yet without reasonable regard for the rights of other men.¹

Liability *ex delicto* for the consequences of negligence as regarded by the law arises however by reason only of acts, or omissions after the doing of acts. In respect of omissions not preceded at any time by overt acts, either by the defendant or by his predecessors in interest, in connection with that which occasions the damage, there may indeed be liability *ex contractu* (the omission being a breach of contract); there can be no liability in *tort* as for negligence. An innkeeper may be liable for refusing to receive a man as guest into his inn; but the liability incurred cannot properly be treated as growing out of negligence.

There can arise indeed no civil liability for the negligent omission to do a thing required by law, though commanded by the Legislature, unless that neglect be connected with the existence of something already done. A town may be required to build a bridge across a stream, but no one can maintain an action for damages against the town for neglecting, however inexcusably, to build the bridge; though an action might be maintained for damage caused by the breaking of a bridge through failure to repair it, if the town was bound to keep it in proper condition. In the latter case, there is an omission preceded (at some time) by an overt act; to wit, the building of the bridge. When it is said that no action *ex delicto* can be maintained for a pure non-feasance, consisting in neglect of duty, the former sort of case is to be understood as intended.

It is declared by all the authorities that the standard by which to determine whether a person has been guilty of negli-

¹ There must be neglect of some duty towards the person misled, 'and not merely neglect of what would be prudent in respect to the party himself.' Blackburn, J., in *Swan v. North British Australasian Co.*, 1 Hurl. & C. 181.

gence in common form is the conduct of the defendant in the particular situation; the amount of care, skill, diligence or the like, varying according to the particular Standard of liability. case. The amount of care or the like required may thus vary to the greatest extent, while the standard itself — the care, skill, or diligence of a careful, skilful, or diligent man in the particular situation — remains the same.

But, if not properly understood, this standard may itself be misleading. A blacksmith finds a watch by the roadside, and on opening it and seeing that it is full of dirt, attempts to clean it, when a watchmaker is near; but in doing so, though exercising, it may be, the greatest care, he injures it by reason of his lack of skill. Now in attempting to put the watch in order, and thus perhaps preventing its ruin, he has done nothing that a prudent man might not have done; and, taking the criterion in its broadest sense, the blacksmith could not be liable to the owner of the watch for the damage which he did to it; while the law would probably be just the contrary.¹

A prudent *blacksmith* however would not have undertaken to put the watch in order; he would have taken it to the watchmaker. The prudent man, ordinarily, with regard to *undertaking* an act, is the man who has acquired the skill to do the act which he undertakes; a man who has not acquired that special skill is imprudent in undertaking to do the act, however careful he may be, and however great his skill in other things.²

The criterion then of the conduct of the defendant in the undertaking of an act is to be understood with the limits suggested. The question to be raised with regard to a man's conduct brought in question in such a case is, whether an ordinary or average man of his calling or business or skill would have undertaken to do the thing in question; supposing the party to have exercised due care in executing the work undertaken.

¹ It is to be noticed that as a watchmaker is near, the act could not be considered one of necessity.

² See *Dean v. Keate*, 3 Campb. 4.

When an act has been undertaken by a person whose business or profession covers the doing of acts of the kind in question, the question to be decided is, whether that skill or care or diligence has been exercised which a man of the same business would have exercised in the same situation.

In regard to omissions (after overt acts) to perform acts not distinctly and certainly required by law, the question of the duty to perform them is to be decided by the general practice of prudent or careful or diligent men of the same occupation, when such a practice exists. When no such general practice exists, as perhaps in regard to the use of fire-arms or other dangerous weapons,¹ the question is decided upon the reasonably supposable conduct, higher or lower, of the prudent man, according to the circumstances or the nature of the case.²

In the more common cases, such as actions for damage to property or for bodily injuries caused by collisions, the falling of timbers or other materials, or of buildings, unguarded excavations or openings, obstructions in the highway, blasting, explosions, fires, and runaways,

¹ The rule in early times in regard to such cases seems to have been that the defendant had to exempt himself from liability for the damage done, if he could, by showing that the misfortune happened entirely without his will, or at least without his fault. See Year Book, 21 Hen. 7, 28 (shooting at butts); *Weaver v. Ward*, Hob. 134; *Lambert v. Bussey*, T. Raym. 421. But the rule has changed in conformity with modern theories of civil liability, as shown hereafter, and the test now is of negligence as in other cases. Nitro-Glycerine Case, 15 Wall. 524; *Moebus v. Becker*, 46 N. J. 41; *Winans v. Randolph*, 169 Penn. St. 606; *McCleary v. Frantz*, 160 Penn. St. 535; *Scanlon v. Wedger*, 156 Mass. 462; *Glueck v. Scheld*, 125 Calif. 288; *Stanley v. Powell*, 1891, 1 Q. B. 86. See also *Dixon v. Bell*, 5 Maule & S. 198. Greater care will be required in the use of such weapons than in that of things not dangerous; but the question still is of the conduct of the prudent man in using them, and that question is one of fact. *Moebus v. Becker* and *McCleary v. Frantz*, supra.

Note then the distinction between the firing off a gun, and such cases, as explosions of nitro-glycerine or the bursting of reservoirs. See chapter xix.

² See *Mulligan v. New Britain*, 69 Conn. 96; *Uggla v. West End Ry. Co.*, 160 Mass. 351; *Ellis v. Lynn R. Co.*, id. 341.

and endless other ‘accidents’ so-called,—in common cases such as these the question actually put to the jury or to the judge for decision is whether the defendant was in the exercise of due or reasonable care at the time of the misfortune. Other questions may be involved; but the question of the defendant’s negligence is always fundamental, and usually takes the form stated.

A remark should be made upon the question whether the conclusion or inference to be drawn from the facts in the case of an action for negligence is a matter of law or of fact. The authorities do not give any categorical answer to the question, but this appears to be the effect of them: Where the facts are found, and it is manifest, beyond ground for question, that a prudent man would or would not act or omit to act as the defendant has done, the conclusion or inference may be considered a matter of law. This is true whether the question be one of negligence in the defendant or contributory negligence,¹ negligence in the plaintiff.² The same is also true where the law (statute for instance) has prescribed, as in some cases it has,³ the

¹ The so-called ‘stop, look and listen’ rule in regard to crossing steam or electric railways is an example. Northern Pacific R. Co. v. Freeman, 174 U. S. 379; Cawley v. La Crosse Ry. Co., 101 Wis. 145. The rule is not accepted everywhere. Atlantic City R. Co. v. Goodin, 45 L. R. A. 671 (N. J.). See Harvard Law Rev., Nov. 1899, p. 226; post, p. 184.

² ‘We are of opinion,’ said Mr. Justice Brewer, in Elliott v. Chicago Ry. Co., 150 U. S. 245, 246, ‘that the deceased was guilty of contributory negligence, such as to bar any recovery. It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury; yet when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. Railroad Co. v. Houston, 95 U. S. 697; Schofield v. Chicago, Milwaukee, & St. Paul Railroad, 114 U. S. 615; Delaware, Lackawanna, etc. Railroad Co. v. Converse, 139 U. S. 469; Aerkfet v. Humphreys, 145 U. S. 418.’ But if reasonable men might differ, the question is for the jury. Warner v. Baltimore R. Co., 168 U. S. 339.

³ Thus in some States trustees in making investments of funds must invest them in first mortgages of real estate, or in government securities,

nature of the duty, and also where there exists a well-known practice in the community, of a proper character; in such cases the standard of duty is fixed in regard to the very conduct to be pursued, — given the facts, and the conclusion is of law. In other and more numerous cases the conclusion or inference is one of fact.¹ There are many contradictory dicta in the books concerning the effect of the violation of a statute or town ordinance, in suits for negligence. It is said that the violation in such cases is negligence *per se*; and the contrary is also laid down. The latter appears to be the correct rule; the defendant's conduct being properly only a fact to be considered on the question of his negligence,² unless statute plainly provides otherwise.³

It should further be stated that a very large part of the litigation pertaining to suits for negligence turns upon the question whether the facts submitted to the court make a case which may be submitted to the jury, in jury trials, as furnishing evidence upon which negligence may properly be found. To consider such questions would require a detailed examination of the authorities beyond the purpose of this book.

Thus far of what may be called the ordinary doctrine of negligence, or negligence in common form, where the relation

unless the instrument (if any) creating the trust otherwise prescribes or permits. See Hemphill's Estate, 18 Penn. St. 303. Practice or advice of others, however competent, would not excuse any departure from the requirement, in the absence of extraordinary circumstances. The rule just stated in regard to the funds in which investment should be made is not universal. *New England Trust Co. v. Eaton*, 140 Mass. 532, 535; *Brown v. French*, 125 Mass. 410.

¹ See L. C. Torts, 589-596.

² See among the cases to this effect, *Jackson v. Castle*, 82 Maine, 579; *Burbank v. Bethel Mill Co.*, 75 Maine, 382; *Gilmore v. Ross*, 72 Maine, 194; *Lane v. Atlantic Works*, 111 Mass. 136; *Meek v. Pennsylvania R. Co.*, 38 Ohio St. 632; *Knuple v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Cook v. Johnston*, 58 Mich. 437. See also *Pennsylvania R. Co. v. Kensil*, 70 Ind. 569.

³ *Tennessee R. Co. v. Walker*, 11 Heisk. 383.

of the defendant to the plaintiff is merely that of man to man, no contract between the parties existing to modify the general doctrine, or to direct it into any particular *Special cases.* channel, and no special situation or office affecting it in law. Several classes of cases will now be considered in which the relation of the parties is more or less affected by contract¹ or by law, the general standard of liability being more or less affected accordingly, or superseded altogether; these to be followed by cases in which the question is whether the defendant owed any duty to the plaintiff.

§ 3. INNKEEPER AND GUEST.

With regard to the duties of innkeepers, it will be almost sufficient in the present connection to say that, though it has sometimes been considered that for loss or damage *Negligence.* to the goods of guests liability depends upon the question of negligence in the host, or in his servants acting for him,² it is now more generally considered that an innkeeper's liability for the failure to keep the goods of his guest safely, when once delivered into the former's custody, arises independently of the question of negligence. The host is now held liable for damage to or loss of the goods put in his custody, though he exercise the greatest diligence in the care of them, unless the loss occur by the guest's negligence, or by *vis major*, inevitable accident, or the act of God.³

¹ In cases arising on negligence as a tort, though proceeding from contract, privity is generally held unnecessary. *Hayes v. Philadelphia Coal Co.*, 150 Mass. 457; *Devlin v. Smith*, 89 N. Y. 470; *Bright v. Barnett Co.*, 88 Wis. 299. There are cases however which support the contrary view in regard to certain kinds of contract, especially in sales of chattels. See *Devlin v. Smith*, *supra*; *Fairmount Ry. Co. v. Stuther*, 54 Penn. St. 375.

² *Dawson v. Chamney*, 5 Q. B. 164; *Merritt v. Claghorn*, 23 Vt. 177; *Metcalf v. Hess*, 14 Ill. 129.

³ *Armistead v. Wilde*, 17 Q. B. 261; *Cashill v. Wright*, 6 El. & B. 891; *Morgan v. Ravey*, 6 H. & N. 265; *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515; *Shaw v. Berry*, 31 Maine, 478; *Norcross v. Norcross*, 53 Maine, 163; *Sibley v. Aldrich*, 33 N. H. 553; *Manning v. Wells*,

It follows, a fortiori, that the innkeeper is liable in case of loss sustained by reason of his own negligence, or that of his servants; but, inasmuch as the question of his liability does not turn upon the proof of negligence in the ordinary sense, the subject need not be here pursued.

It is proper however to mark the fact in this connection that a question of contributory negligence¹ may arise in considering cases of innkeeper and guest, as well as in other cases. If the negligence of the guest occasion the loss in such a way that it would not have happened if the guest had exercised the usual care that a prudent man might reasonably be expected to have taken under the circumstances, the innkeeper is not liable.²

§ 4. BAILOR AND BAILEE.

So much of the subject of bailment as relates to breaches of duty by common carriers may be dismissed with a brief word. The liability of a common carrier, when once the engagement of common carrier has begun,³ is similar to that of an innkeeper, and does not turn upon the question of negligence, the subject of the present chapter. And there are other cases in which the bailor of an article for special use, as a 'job-master' of carriages, while not for all purposes an insurer, is still liable, at least in England, for loss happening without negligence in the ordinary sense.⁴ These too fall without the present subject.

⁹ Humph. 746; Thickstun *v.* Howard, 8 Blackf. 535; Berkshire Woollen Co. *v.* Proctor, 7 Cush. 417; Cohen *v.* Frost, 2 Duer, 341; Piper *v.* Manny, 21 Wend. 282; Hulett *v.* Swift, 33 N. Y. 571; Wilkins *v.* Earle, 44 N. Y. 172; Houser *v.* Tully, 62 Penn. St. 92; Rockwell *v.* Proctor, 39 Ga. 105. But this subject is much regulated by statute.

¹ Post, § 15.

² Cashill *v.* Wright, 6 El. & B. 891; Oppenheim *v.* White Lion Hotel Co., L. R. 6 C. P. 515.

³ Note the distinction; until the engagement as common carrier begins with a person it is nothing that the carrier is in general a common carrier or is such toward other persons. Before that time begins the duty may be simply the usual one, not to be negligent.

⁴ See e. g. Hyman *v.* Nye, 6 Q. B. D. 685. The liability of one

It was long considered a settled doctrine of the English law that the duty of bailees was to be distributed under Degrees of three heads, having reference respectively to the negligence. nature of the bailment; to wit, (1) the duty to observe very great care, (2) the duty to observe ordinary care, and (3) the duty to observe slight care only. Conversely therefore the bailee was deemed to be liable for loss sustained by the bailor, under the first head, if the bailee were guilty of slight negligence; under the second head, if he were guilty of 'ordinary negligence,' or rather of negligence of an intermediate grade; and, under the third head, if he were guilty of gross negligence.¹

The application of these three degrees of negligence was thus explained: If the bailment were gratuitous by the bailor, that is, for the sole benefit of the bailee, the bailee was deemed to be liable for loss or damage to the subject of the bailment occasioned even by slight negligence on his part. If the bailment were for hire, that is, for the mutual benefit of the bailor and the bailee, he was deemed to be liable for the consequences of negligence of an intermediate grade only. If the bailment were without benefit to the bailee, that is, if the bailor had requested the bailee to take care of his, the former's, goods without reward, the bailee was deemed to be liable for the result of gross negligence only.²

This doctrine arose from a misconception apparently of the Roman law, the doctrines of which were resorted to in order

Roman law
misunder-
stood. to assist in the solution of a question which arose in England in the eighteenth century.³ But it remained in the English law unchallenged for so

whose business is to let carriages is here put upon the footing of coach proprietors and railway companies. 'He is an insurer against all defects which care and skill can guard against.' *Id.* Lindley, J. He is not an insurer against all defects absolutely. *Id.*

¹ *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Smith's L. C. 188, 7th ed.

² *Id.*

³ *Coggs v. Bernard*, *supra*. Lord Holt took his Roman law mainly from the mediæval jurists, or glossarists. Wharton, Negligence, § 57 et seq.; Smith, Negligence, 11 et seq., 2d ed.

long a time that it has not been readily abandoned, and it may be still considered as retaining some faint vitality in England and in various parts of the United States.

The tendency of authority for a considerable time has been to break away from this division of negligence, and to accept substantially what seems to have been the true doctrine of the Roman law in regard to bailments, ^{Tendency of authority.} as well as in relation to other subjects covered by the title Negligence. The effect is to make the criterion of liability to depend upon the consideration already adverted to, whether the party complained of conducted himself in the particular situation as a man of prudence or carefulness or skill, of the same business, would have conducted himself, or as prudent or careful or skilful men, of the same business, generally do conduct themselves in the like situation.¹

This criterion indeed will often if not generally be found to be the real test applied in those cases in which the old terms are used. For example: The defendant, a bailee of money to keep without reward, gives the following account of himself: He was a coffee-house keeper, and had placed the money in question in his cash-box in the tap-room, which had

¹ As indicating the tendency to discard the old theory of the three degrees of negligence, see *Wilson v. Brett*, 11 M. & W. 113; *Hinton v. Dibdin*, 2 Q. B. 646; *Grill v. General Collier Co.*, L. R. 1 C. P. 600; *Beall v. South Devon Ry. Co.*, 3 H. & C. 337; *Giblin v. McMullen*, L. R. 2 P. C. 317, 328; *The New World*, 16 How. 469; *Milwaukee Ry. Co. v. Arms*, 91 U. S. 489, 494; *Perkins v. New York Central R. Co.*, 24 N. Y. 196, 82 Am. Dec. 282; *Cass v. Boston & L. R. Co.*, 14 Allen, 448; *Lane v. Boston & A. R. Co.*, 112 Mass. 455; *Briggs v. Taylor*, 28 Vt. 180; *Alabama R. Co. v. Hall*, 105 Ala. 599; *Culbertson v. Holliday*, 50 Neb. 229. For the purpose of exemplary damages there may well be a distinction in favor of gross negligence. *Alabama R. Co. v. Arnold*, 84 Ala. 159.

In the Roman law there were two branches (rather than degrees) of negligence, expressed respectively by the terms 'culpa levis' and 'culpa lata.' The former was the absence of the diligence of a good man of affairs ('diligentia boni patrisfamilias'); the latter the failure to exercise those mental faculties which all men habitually exercise ('non intellegere quod omnes intellegunt'). The two ideas together answer pretty nearly to our prudent, careful, diligent, or skilful man in the particular situation.

a bar in it, and was open on Sunday; and on a Sunday the cash-box was stolen. The defendant's liability turns upon the question whether he has taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; if not, he is deemed to be guilty of 'gross negligence' and liable for the loss.¹ Again: The defendants receive a deposit of bonds from a stranger, S, to be kept without reward. Subsequently another stranger calls for and gets the bonds, representing himself to be S, the depositor. The judge instructs the jury that, if the defendants are guilty of want of 'ordinary care' under all the circumstances, they are liable, otherwise not. The instruction is correct, being equivalent to a ruling that the defendants are liable for gross negligence only.² Again: The defendants receive a deposit of debentures to be kept without reward, and the cashier of the bank fraudulently abstracts the same and makes away with them. The defendants are liable if they have failed to exercise 'ordinary care,' which means a failure to exercise that ordinary diligence which a reasonably prudent man takes of his own property of the like description.³

The foregoing are examples of liability in cases of bailment without reward; but the same principles govern bailments for ~~Bailment for~~ hire. For example: The defendants, warehousemen for hire, lose by theft the plaintiff's property, while the same is in their keeping. They have exercised the care usually exercised in the vicinity by other like warehousemen. They are not liable, having exercised 'ordinary care.'⁴ Again: The defendants, warehousemen in a large

¹ *Doorman v. Jenkins*, 2 Ad. & E. 256. The question, it will be seen, was not whether the defendant had taken the same care of the money that he took of his own.

² *Lancaster Co. Bank v. Smith*, 62 Penn. St. 47. See also *Foster v. Essex Bank*, 17 Mass. 479, 486.

³ *Giblin v. McMullen*, L. R. 2 P. C. 317; *Fulton v. Alexander*, 21 Texas, 148.

⁴ *Cass v. Boston & L. R. Co.*, 14 Allen, 448. See *Lane v. Boston & A. R. Co.*, 112 Mass. 455.

city, receive from the plaintiffs for reward a large quantity of salt in barrels, which they store in a loose frame warehouse, situated in an alley, back of their business house. Of the whole amount about two hundred and forty barrels are stolen; and it is afterwards discovered that the theft was going on at intervals for a month. It was effected by entering through an opening in the side of the building, a plank there being off, and then opening the alley door and rolling out the barrels. Drays were thus loaded early in the morning, sometimes before sunrise, sometimes a little after; the defendants having no watchman there. The defendants are liable, because they failed to exercise 'ordinary care or diligence;' though it appears to be usual in the particular city to pile such barrels in open sheds, or on vacant lots, or on the sidewalk, or occasionally in warehouses such as the one in question, — some supervision or examination of the premises being reasonably required in the course of a month.¹

The result therefore is, that the terms 'gross negligence' and 'negligence' are, with regard to goods bailed, now used to prescribe liability where the defendant or his 'Gross negligence' servants have not taken the same care of the property.

property intrusted to them as a prudent man would have taken of his own in the same situation.² Or as it has recently been laid down by judicial authority: For all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence is 'gross negligence.' What is reasonable, varies in case of a gratuitous bailee and that of a bailee for hire. From the former are reasonably expected such care and diligence as persons ordinarily use (that is, careful persons) in their own affairs, and such skill as the bailee has. From the latter are reasonably expected such care and diligence as are exercised in the ordinary and proper course of similar business, and such skill as the bailee

¹ *Chenowith v. Dickinson*, 8 B. Mon. 156.

² *Briggs v. Taylor*, 28 Vt. 180. See also *Duff v. Budd*, 3 Brod. & B. 177; *Riley v. Horne*, 5 Bing. 217; *Batson v. Donovan*, 4 B. & Ald. 21.

ought to have; namely, the skill usual and requisite in the business for which he receives payment.¹

On the other hand, in regard to the converse question of the duty of the bailor to the bailee (which does not concern the dogma of the three degrees of negligence), it is clear that a gratuitous bailor stands in a different position from a bailor for reward. A bailor for a price may well be required to look to the safety of the bailee; but a man cannot be required to enlarge his *gift*, as he would be if he were to be held liable for defects in the chattel by which the bailee sustained damage, for to make him liable would virtually be to say that he must put the chattel in good condition before lending it. It would require some assurance in a gratuitous bailee to say to the bailor, 'I want your cart to fetch my turnips to market, but you must put it in perfect order if you let me take it.' For 'passive' negligence, i. e. a want of knowledge of defects which by care or diligence he might have known, the bailor would not be liable.²

The contrary would be true if the bailor's negligence was 'active,' that is, if he knew of the danger and did not notify the bailee.³ It is then the duty of the bailor, whether the bailment be for reward or not, to notify the bailee of danger if he knows there is danger; as where a person employs another to carry an article which from its dangerous nature requires more than ordinary care; in such a case the bailor must give reasonable notice of the nature of the article, otherwise he will be liable for the natural consequences of the neglect.⁴ For example: The defendant delivers a carboy of nitric acid to the plaintiff, servant of a Croydon carrier, to be taken to Croydon, without notifying him of the nature of

¹ *Beal v. South Devon Ry. Co.*, 3 H. & C. 337; *Exch. Ch.*, Crompton, J., speaking for the court.

² See *Indermauer v. Dames*, L. R. 1 C. P. 274 (s. c. L. R. 2 C. P. 318). The text applies equally to gifts. *Id.*

³ *Id.*

⁴ *Willes, J.*, in *Farrant v. Barnes*, 11 C. B. n. s. 553, 564.

the article; and there is nothing in its appearance to indicate its nature. While he is carrying it, the carboy bursts from some unexplained cause, and the plaintiff is injured. The defendant is liable.¹

§ 5. BAILMENT FOR SERVICE.

Thus far of bailment for custody (*locatio custodiæ*), or for hire (*locatio rei*), or the like. The bailment may require the performance of services upon chattels (*locatio operis*); but the rule with regard to diligence is still the same. The bailee is bound to exercise ordinary care; to wit, the care of a prudent man of the same occupation, and under the same circumstances. He is also bound to exercise a fair average degree of skill in relation to the business which he undertakes; to do his work in a workmanlike manner; and to be possessed of sufficient skill to execute it. He will therefore be liable, *prima facie*, if he should either make an engagement without sufficient skill to execute it, or if, possessing the adequate skill, he should not exercise it. For example: The defendant hires a horse of the plaintiff which becomes slightly sick. The defendant, not being a farrier, thereupon prescribes improperly for the horse, and the medicine kills it. A farrier being near at hand at the time, this is a breach of duty to the plaintiff.² Again: The defendant, a builder of houses, undertakes for the plaintiff to rebuild a good and substantial front to his house, but he builds the same so out of perpendicular that it must be taken down. The defendant is liable in an action for negligence.³

The degree of skill and care required rises in proportion to the value, the delicacy, and the difficulty of the operation. A workman employed to repair the works of a very delicate instrument would be expected to

Nature of the work.

¹ *Farrant v. Barnes*, *supra*. See *Brass v. Maitland*, 6 El. & B. 470.

² *Dean v. Keate*, 3 Campb. 4.

³ *Farnsworth v. Garrard*, 1 Campb. 38.

exert more care and skill than would be required about an ordinary undertaking.¹ The criterion of liability however still remains the same; if all things are done by the workman which a careful and skilful workman in the same situation and business would do, he will be exonerated from liability though he break the instrument.²

It should be observed however with regard to cases requiring the exercise of skill, that a bailee is not to be required to possess extraordinary skill, such as is possessed by but few persons only in the particular business, but only a fair average, or ordinary, degree of skill; unless indeed he engage to possess extraordinary ability. In the absence of agreement or false representation, reasonable skill constitutes the measure of the engagement of the workman in regard to the thing undertaken.³

On the other hand, a bailee employed to do work unfamiliar to him is not liable, it seems, for failing to possess the requisite skill for the work, if he has not held himself out as possessing such skill. It is the bailor's fault if he intrust a work requiring the exercise of skill to one whom he knows to be without it. For example: The defendant, a master, is employed by the plaintiff, with notice, to embroider a fine carpet, and the defendant, from want of skill, spoils the materials put into his hands by the plaintiff for the purpose. This is no breach of duty, the defendant not having represented himself competent for such work.⁴

It is further to be observed that if the loss or bad execution be not properly attributable to the fault or unskilfulness of the workman, or of his servants, but arise from an inherent defect in the thing upon which the work is done, the bailor, having furnished the materials, cannot treat the bailee as guilty of negligence.⁵ But if the materials were furnished by the bailee, and the result were a failure to perform the

¹ Story, Bailments, § 432.

² Id.

³ Id. § 433.

⁴ Id. § 435.

⁵ Id. § 428 a.

contract altogether, or a failure to perform it within the time agreed upon, the bailee would be liable; unless perhaps the materials required by the bailor were such as he (the bailee) was not familiar with, and he had exercised such skill as he possessed in the management of them.¹

§ 6. PROFESSIONAL SERVICES.

The only difference between the case presented in the present section and that in the preceding is that there is now no bailment of goods to be wrought upon. The rules of law with regard to the duty of the person employed are not materially different from those above presented. To render a professional man liable for negligence, it is not enough that there has been a less degree of skill than some other professional men might have shown. Extraordinary skill is not required unless professed or contracted for; a fair average degree of skill is all that can be insisted on. Or, as it has been laid down, a person who enters a learned profession undertakes to bring to the exercise of his business nothing more than a reasonable degree of skill and care. He does not undertake, if an attorney, that he will gain a cause at all events, or, if a physician, that he will effect a cure.²

Reasonable
care and dilige-
gence.

For special illustration of the application of this doctrine, the nature of the liability of lawyers and of doctors of medicine for negligence may be taken.

Every client has a right to expect the exercise, on the part of his counsel,³ of care and diligence in the performance of the business intrusted to him, and of a fair average degree of professional skill and knowledge; Lawyers.

¹ In the latter case the bailor might himself be liable to the bailee, as in case of injury from dangerous materials ordered by the bailor.

² *Lamphier v. Phipos*, 8 Car. & P. 475, Tindal, C. J.; *Hart v. Frame*, 6 Clark & F. 193, 210; *Graham v. Gautier*, 21 Texas, 111; *Dashiell v. Griffith*, 84 Md. 363.

³ 'Counsel' here = lawyer of any grade or name.

and if an attorney has not as much of these qualities as he ought to possess, or if, having them, he neglects to use them, the law makes him liable, *prima facie*, for any loss which may have been sustained thereby by his client.¹

Hence a lawyer possessed of a reasonable amount of information and skill, according to the duties which he undertakes to perform, and exercising what he possesses with reasonable care and diligence in the affairs of his client, is not liable for errors in judgment, whether in matters of law or of discretion, unless he profess to have a high order of skill.

It is clear however that, when an injury has been sustained which could not have happened except from want of reasonable skill or diligence on the part of the lawyer, the law will hold him liable. To take proceedings upon a wrong statute, where there is no question of doubtful construction involved, would be evidence of negligence under this rule. For example: The defendant, a lawyer, is employed to take statutory proceedings on behalf of the plaintiffs against their apprentices for misconduct. The defendant proceeds upon a section of the statute relating to servants and not to apprentices. This is deemed such a want of skill or diligence as to render the lawyer liable to repay to the plaintiffs the damages and costs incurred by his mistake.²

If a lawyer has doubt in regard to the legal effect of an instrument in which his client is concerned, and submits the question to counsel for advice on which to act, he must state the facts correctly and with fulness. If, instead of laying the facts of the case fully before counsel, he attempts to state inferences from the facts, he acts at his peril. The counsellor should be permitted to draw his own inferences. For example: The defendant, a lawyer employed by the plaintiff, seeking counsel of another lawyer, misstates the legal effect of certain deeds not accompanying the case, whereby he (the defendant) receives and acts upon incorrect advice,

¹ Saunders, Negligence, 155.

² Hart v. Frame, 6 Clark & F. 193.

to the damage of the plaintiff. This is evidence of negligence.¹

In the like exercise of due care and skill, a lawyer employed to investigate the title to an estate, or to seek out a good investment and obtain security for money advanced, must examine the title to and extent of the security offered; and even then, if the title prove obviously defective, or the security prove evidently bad or insufficient, he will be liable.²

The authorities, finally, appear to establish the rule that a lawyer is liable for the consequences of ignorance or non-observance of the rules of practice of court, for the want of care in the preparation of a cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of the cause as is usually allotted to his department of the profession. On the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually submitted to one in the highest walks of the legal profession.³

To render a doctor of medicine liable for negligence, there must likewise appear to have been a failure to exercise such diligence or skill as a prudent practitioner of fair ability would have exercised under the same circumstances.⁴ The degree of diligence required will be proportionate to the nature of the case; and, in some cases, nothing short of the highest degree of diligence can satisfy the law.

As regards the *skill* to be exercised however, nothing more than a reasonable degree can be insisted upon; the law does not require the exercise of the highest medical ability,⁵ unless the party has held himself out as possessed of it or has contracted to give it. For example: The defendant, a physi-

¹ *Ireson v. Pearman*, 3 B. & C. 799.

² *Knight v. Quarles*, 4 Moore, 532; *Whitehead v. Greetham*, 10 Moore, 183; *Donaldson v. Haldane*, 7 Clark & F. 762.

³ *Godefroy v. Dalton*, 6 Bing. 460.

⁴ *Dashiell v. Griffith*, 84 Md. 363.

⁵ *Graham v. Gautier*, 21 Texas, 111.

cian, is retained as accoucheur to attend the plaintiff's wife, and the plaintiff alleges that he failed to use due and proper care and skill in the treatment of the lady, whereby she was injured. The judge instructs the jury that it is not enough to make the defendant liable that some medical men, of far greater experience or ability, might have used a greater degree of skill, nor that even he might possibly have used some greater degree of care. The question to be decided is, whether there has been a want of competent care and skill to such an extent as to lead to the bad result.¹ Again: The defendant, a surgeon, is employed by the plaintiff to treat an injury to his hand and wrist; and the plaintiff alleges that he conducted himself in the business in such a careless, negligent, and unskilful manner, that the plaintiff's hand became withered, and was likely to become useless. The judge instructs the jury that the question for them to decide is, whether they are satisfied that the injury sustained is attributable to the want of a reasonable and proper degree of care and skill in the defendant's treatment. The defendant's business did not require him to undertake to perform a cure, nor to use the highest possible degree of skill.²

If the patient, by refusing to adopt the remedies of the physician, frustrate the latter's endeavors, or if he aggravate the case by his own misconduct, he, of course, cannot hold the physician liable for the consequences attributable to such action. Still if, after such misconduct, the physician continue to treat the patient, he will be liable for any injury sustained by reason of his own negligence in such subsequent treatment.³ Want of consideration is by the better rule no defence.⁴

¹ Rich *v.* Pierpont, 3 Fost. & F. 35.

² Lamphier *v.* Phiros, 8 Car. & P. 475. These two cases, though *ex iuri prius*, are often referred to as authority. Like the second is Wood *v.* Clapp, 4 Sneed, 65.

³ Hibbard *v.* Thompson, 109 Mass. 286; Wharton, Negligence, § 737.

⁴ Gill *v.* Middleton, 105 Mass. 479. But see Ritchey *v.* West, 23 Ill. 385, proceeding upon the old notion of bailment without reward.

§ 7. TELEGRAPH COMPANIES.

Telegraph companies are bound to exercise reasonable diligence and care in the transmission of messages, which in their business imports a very high degree of diligence and care,¹ and are liable to the senders for any failure to conform to the requirements of this duty.² They are not insurers of the correct transmission of despatches,³ but they are *prima facie* liable for failure to transmit a message correctly.⁴

Great diligence and care.

They are indeed *prima facie* bound to deliver the precise message given them for transmission, when it is legibly written.⁵ For a failure to do so they are liable, in the absence, at least, of a rule requiring the message to be repeated by the receiver, and this too even in the face of a notice to the contrary; unless the error was caused by the condition of the atmosphere, or by some other obstacle, without fault on the part of the telegraph company. For example: The defendants receive a message from the plaintiffs for transmission at night, ordering a cargo of corn at a price named by the owner. The message is written upon a blank of the defendants, at the top of which is a declaration that the defendants are not to be liable for mistakes, or delays, or non-delivery beyond the sum paid for the message. The message is sent; but, by reason of the defendants' negligence, it is not correctly delivered, and the plaintiffs fail to obtain the corn at the price named, the grain having directly advanced in price. The defendants are liable, the notice being unreasonable.⁶

¹ *Jones v. Western Union Tel. Co.*, 101 Tenn. 442.

² *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428, 434.

³ *Western Union Tel. Co. v. Chamblee*, *supra*; *Western Union Tel. Co. v. Carew*, 15 Mich. 525, 533; *Breese v. United States Tel. Co.*, 48 N. Y. 132; *Playford v. United Kingdom Tel. Co.*, L. R. 4 Q. B. 706, 710.

⁴ *Western Union Tel. Co. v. Chamblee*, *supra*; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256.

⁵ Cases just cited.

⁶ See *True v. International Tel. Co.*, 60 Maine, 9. The message was not delivered at all in this case.

A condition that the telegraph company shall not be liable to the sender of a despatch for a mistake in it, unless the message shall be repeated by the receiver, is however held by many, but not by all, authorities to be reasonable and valid, though referred to as among the conditions on the back of the blank used by the sender, and though it be not read.¹ And the same is true of a condition that the telegraph company shall not be liable for mistakes occurring on other lines, in the course of transmitting a message, though the first company receive pay for the entire transmission.² But it is held that a condition that the company shall not be liable for mistakes or delays in transmitting despatches applies merely to the transmission, and not to delays in delivering them.³

It is proper, in this connection, to observe that, by the American law, the telegraph company is also liable to the **Liability to** person to whom the message is transmitted, upon **the receiver.** delivery thereof, in case of an error in transmission attributable to the fault of the company, when the error is attended with damage to the person receiving it.⁴ The rule is otherwise in England.⁵ But the telegraph company

¹ *Breese v. United States Tel. Co.*, 48 N. Y. 132; *Wolf v. Western Union Tel. Co.*, 62 Penn. St. 83; *Ellis v. American Tel. Co.*, 13 Allen, 226; *Western Union Tel. Co. v. Carew*, 15 Mich. 525. *Contra*, *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428; 25 Am. & Eng. Encycl. Law, 791, 792, and cases cited.

² *Western Union Tel. Co. v. Carew*, *supra*.

³ *Bryant v. American Tel. Co.*, 1 Daly, 575.

⁴ *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; *Telegraph Co. v. Mellon*, 96 Tenn. 66, 69; *New York & W. Tel. Co. v. Dryburg*, 35 Penn. St. 298; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; *Ellis v. American Tel. Co.*, 13 Allen, 226; *Gulf Ry. Co. v. Levy*, 59 Texas, 563. See *Lyne v. Western Union Tel. Co.*, 123 N. C. 129; *Manly Manuf. Co. v. Western Union Tel. Co.*, 105 Ga. 235; *Hasbrouck v. Western Union Tel. Co.*, 107 Iowa, 160. The ground of liability is variously stated. See L. C. Torts, 621 et seq. One ground taken is that the defendants are to be treated as having made to the plaintiff a false representation of their authority from the sender to deliver the message. *May v. Western Union Tel. Co.*, 112 Mass. 90

⁵ *Playford v. United Kingdom Tel. Co.*, L. R. 4 Q. B. 706. The

is probably under no liability to the person to whom a message is addressed for a failure, however negligent, to deliver, unless the sender was his agent.

§ 8. DUTY OF AGENTS, SERVANTS, TRUSTEES, AND THE LIKE.

The test of the liability of an agent to his principal for damage done by reason of alleged negligence is, speaking generally, the conduct of a diligent or careful or skilful agent in the like situation. If the agent's action conform to this standard, he will be exempt from liability; otherwise not. But it is important to look into this rule.

Diligence,
care, and
skill.

In accordance with the general rule, it is held not necessary, in order to fix the liability of a factor to his principal for damage, to prove that the factor has been guilty of fraud or of such gross negligence as might carry with it a presumption of fraud. The factor is required to act with reasonable care and prudence in his employment, exercising his judgment after proper inquiry and precautions.¹ If the exercise of ordinary diligence on his part would have prevented the loss, he will be liable; otherwise not. For example: The defendants, factors, are directed by the plaintiff, their principal, to remit in bills the amount of funds in their hands. They do so in the bills of persons who at the time are in good credit in the place in which the factors reside, though not in the place of residence of the plaintiff. If they have no notice of the latter fact, the defendants are not liable; due diligence not requiring them to make inquiry of the credit of the parties to the bills at the place of residence of the principal, when they are of good credit at the place of resi-

English courts hold that the only duty owed by the telegraph company is to the sender of the message.

¹ Story, Agency, § 186.

dence of the factors.¹ Again: The defendants, factors, are requested to remit to the plaintiff, their principal, in bills 'on some good house in New York,' the plaintiff's place of residence. They remit in the bills of R and B, partners, drawn upon and accepted by B, the former residing at the place of residence of the defendants, the latter at the place of residence of the plaintiff, to the defendant's knowledge. R and B have houses of business at both places. R (the resident party) is in good credit at the defendant's place of residence, but B (the New York party) is not. The defendants are liable whether they knew B's standing or not; being bound to make inquiry in regard to him.²

Extraordinary emergencies may arise in which an agent may, on grounds of necessity, be justified in assuming ex-

Emergency traordinary powers; and his acts fairly done under
may add au- such circumstances will be deemed lawful.³ Indeed it seems clear that the presence of such

emergencies may not only justify, but, in the light of prudence, even demand the resort to extraordinary measures. Ordinarily, it is proper and probably necessary for an agent to deposit the funds of his principal in bank;⁴ but if a hostile army were approaching the place at the time, to the knowledge of the agent, prudence would require him to make some other and unusual disposition of the funds.⁵

The duty of an agent employed to procure insurance is to take care that the policy is executed so as to cover the contemplated risk; and to this end he is, of course, bound to possess and use reasonable skill. The agent is also to take care that the underwriters are in good credit; though it is enough that they are at the time in good repute.⁶

¹ *Leverick v. Meigs*, 1 Cowen, 645.

² *Id.*

³ *Story, Agency*, § 141; *Bailments*, § 83.

⁴ *Heckert's Appeal*, 69 Penn. St. 264.

⁵ See *Wood v. Cooper*, 2 Heisk. 441.

⁶ *Story, Agency*, § 187.

What is the proper exercise of diligence and skill in such cases is sometimes a matter of great nicety. On the one hand, an agent who acts bona fide in effecting insurance for his principal, using reasonable skill and diligence, is not liable to be called to account, though the insurance might possibly have been procured from other underwriters on better terms, or so as to include additional risks, by which the principal might, in the event of loss by those risks, have been indemnified.¹ On the other hand, an agent in the like case is bound to have inserted in the policy all the ordinary risks commonly covered; and if he omit to have them inserted when a reasonable attention to his business and the objects of the insurance would have induced other agents, of reasonable skill and diligence, to have them inserted, he will be liable for negligence in case of loss.² And the same will be true if he negligently or wilfully conceal a material fact or make a material misrepresentation whereby the policy is afterwards avoided.³

If however it should appear that, even if the duty expected had been performed with proper care, the principal could have derived no benefit therefrom, either because the result would have been contrary to express law or to public policy or to good morals, the negligence of the agent or other party acting in the matter is not a breach of duty.⁴

Servants also are bound to take due care of their master's interests, so far as intrusted to them. If a servant be guilty of a failure to exercise such care or skill or prudence as a diligent servant would exercise under Due care, skill, and prudence. the circumstances, and the master suffer damage thereby, the servant will be liable for a breach of duty. On the other hand, the servant is not bound to prevent loss to his master at all hazards; he is only required to use the care

¹ Story, *Agency*, § 191; *Moore v. Mourgue*, Cowp. 479.

² *Id.* § 191; *Park v. Hammond*, 6 Taunt. 495.

³ *Mayhew v. Forrester*, 5 Taunt. 615.

⁴ Story, *Agency*, § 238.

or skill of a diligent servant. For example: The defendant, a servant, loses by theft of another the goods of the plaintiff, his master and a carrier; but there is no proof of negligence on the part of the defendant. The plaintiff must bear the loss.¹ Again: The defendant, treasurer of the plaintiffs, is charged with a failure to pay over to the plaintiffs specific money in his possession. He pleads that after receiving the money, and before the time when he ought to have paid it or could have paid it to the plaintiffs, he was robbed by violence of the whole amount without any default or want of due care on his part. The plea shows that the defendant has not violated his duty to the plaintiffs.²

A trustee is not liable at common law for a loss which has occurred through him, if he exercised ordinary skill, prudence, and caution.³ In considering whether a trustee has made himself liable for a loss, such as one arising by reason of a failure to collect and convert into money the trust assets, regard must be had to the nature of the trust. A guardian is not in ordinary cases held to such prompt action in enforcing the collection of securities as an executor, administrator, or assignee acting for the benefit of creditors. The duty of a guardian is to hold and retain; of an executor, to collect and prepare for distribution.⁴ But it is the duty of a trustee to be active in reducing to his possession any debt forming part of the trust fund; for the consequences of neglect he would be liable.⁵

An administrator or executor, or an assignee of an insolvent, should within a reasonable time make proper efforts to

¹ *Savage v. Walthew*, 11 Mod. 135, coram Lord Holt.

² *Walker v. British Guarantee Assoc.*, 18 Q. B. 277. See *Doorman v. Jenkins*, 2 Ad. & E. 256; *ante*, p. 120.

³ *Twaddle's Appeal*, 5 Barr, 15; *Miller v. Proctor*, 20 Ohio St. 442; *Harvard College v. Amory*, 9 Pick. 446, 461; *Hunt, Appellant*, 141 Mass. 515; *Charitable Corp. v. Sutton*, 2 Atk. 400, Lord Hardwicke.

⁴ *Chambersburg Sav. Assoc. Appeal*, 76 Penn. St. 203; *Charlton's Appeal*, 34 Penn. St. 473.

⁵ *Caffrey v. Darby*, 6 Ves. 488.

convert all the assets and securities of the estate into money for distribution; failing to make such effort, the party is liable for any loss to the estate thereby sustained. For example: The defendant, an executor, fails for several years after the death of the testator to call in part of the personal estate left out on personal security by the testator himself. The debtor becomes bankrupt, but down to that time pays his interest regularly. Eight months afterwards, the plaintiffs, *cestuis que trust*, request the defendant to call in the money, but nothing can be found. The defendant is liable.¹

If the business of the trustee be such as to involve questions of law, or such as to suggest the aid of legal counsel, due care and diligence will probably require him to obtain legal advice. But having complied, and having no reason to suppose that the advice given is incompetent, the trustee will be exonerated in acting thereon. For example: The defendants, executors of an estate, under directions to invest the moneys of the estate on loan well secured, apply to a lawyer of good standing in another town concerning the security of a mill in that place, offered by a person desiring to borrow money of the defendants, and are told that the security is good; and a mortgage of the borrower's interest therein is accordingly taken. The mill however is owned by the borrower and another in partnership, and is liable for the firm debts. The owners become insolvent, and the note of a third person, well secured, is offered the defendants on condition of a release of the mortgage. By advice of the same lawyer, the offer is declined, and the mill security is lost. The defendants are not liable, having acted with the prudence of men of ordinary diligence, care, and prudence in the matter.²

¹ *Powell v. Evans*, 5 Ves. 839; *Johnson's Estate*, 9 Watts & S. 107; *Chambersburg Sav. Assoc. Appeal*, *supra*.

² *Miller v. Proctor*, 20 Ohio St. 442. The law in some of the States prescribes the duty of trustees in investing trust funds.

Directors of corporations are bound to exercise all the ordinary diligence of persons in the same situation;¹ and that may vary according to the nature of the business.² *What directors should do.* In speculative ventures, so understood by all parties concerned, a less rigid rule of prudence would be applied than in transactions not speculative; and it is laid down that in cases of the first kind ‘*crassa negligentia*’ must be shown, if the directors acted within their powers, in order to impose liability upon them.³ Directors are not in ordinary cases expected to devote their whole time and attention to the corporation over whose interests they have charge, and are not guilty of negligence in failing to give constant superintendence to the business. Other officers, to whom compensation is paid for their whole time in the affairs of the corporation, have the immediate management. But the duties may be such as to require all the time of the directors; and whatever the office, if they undertake it they must perform it fully.⁴

In relation to such other officers, the duties of directors are those of control; and the neglect which would render them liable for not exercising that control properly must depend upon circumstances. They are simply to exercise common diligence over those officers. If nothing, in the exercise of such diligence, has come to their knowledge to awaken suspicion concerning the conduct of the managing officers, the directors are not guilty of negligence, and hence are not liable for losses sustained by reason of the misconduct of such officers.⁵ Those officers are the agents or servants of the corporation, not of the directors.

If however the directors become acquainted with any fact concerning the officers of the body, calculated to put prudent men on their guard, a degree of care commensurate with the

¹ *Overend v. Gibb*, L. R. 5 H. L. 480, 484, Lord Hatherley.

² *Id.*

³ *Id.*

⁴ *York & North Midland Ry. Co. v. Hudson*, 16 Beav. 485, 491, Romilly, M. R.

⁵ *Percy v. Millaudon*, 20 Mart. 68.

evil to be avoided is, it seems, required; and a failure to exercise such care, resulting in damage to the corporation or to its customers, will render the directors personally liable.¹ And the same rule probably applies to all trustees or general officers having the oversight of subordinate officers. But generally speaking the liability of the directors or trustees in such cases is to the corporation itself and not to the individual members.²

§ 9. PUBLIC BODIES AND PUBLIC OFFICERS.

The fact that public bodies or public officers may have contracted with or assumed some duty to the State or to a municipal government to perform a duty faithfully does not imply that they may not also owe special duties to individuals in the performance of their business.³ Their duties in this respect are like those of private individuals transacting similar business; and whether they receive emoluments or not is immaterial.⁴ Such officers are bound to exercise the diligence which the nature of their position reasonably demands; and for a failure, resulting in special damage to any individual, they are liable to him.⁵ For example: The defendant, a municipal corporation, accepts a grant from the English Crown conveying a borough,

¹ Brewer *v.* Boston Theatre, 104 Mass. 378. Quære, if 'crassa negligentia' would be necessary to create liability in such a case? But after all 'crassa negligentia' is only negligence in the particular situation; it is 'crassa' only as compared with what might be negligence in a different situation. See Beal *v.* South Devon Ry. Co., 3 H. & C. 337; ante, p. 121. The want of that prudence which in the same circumstances a prudent man would exercise in his own behalf is 'crassa negligentia.' Lord Hatherley in Overend *v.* Gibb, L. R. 5 H. L. 480, 494.

² Brewer *v.* Boston Theatre, *supra*. It is only from necessity, and to prevent a failure of justice, that individual members of the corporation can proceed against the directors or trustees. *Id.*

³ Henley *v.* Lyme Regis, 5 Bing. 91; s. c. 1 Bing. N. C. 222. See Clothier *v.* Webster, 12 C. B. N. S. 790; Mersey Docks *v.* Gibbs, L. R. 1 H. L. 93; Rhobidas *v.* Concord, 47 Atl. Rep. 82 (N. H.).

⁴ Mersey Docks *v.* Gibbs, *supra*.

⁵ See Story, Agency, §§ 320, 321; Hayes *v.* Porter, 22 Maine, 871.

by which it is directed to keep in repair certain sea walls. The corporation fails in this duty, and the plaintiff, a private citizen, is injured thereby. This is a breach of duty to the plaintiff.¹ Again: The defendant, a public inspector of meat, undertakes, in accordance with his official duty, to cut, weigh, pack, salt, and cooper, for export, a quantity of beef belonging to the plaintiff, and does the same so negligently that the meat becomes spoiled and worthless. This is a breach of duty to the plaintiff, and the defendant is liable to him in damages.²

An individual cannot however for his own benefit, in his own name, maintain a suit against another for negligence in *Suits by individuals.* the discharge of a public duty where the damage is solely to the public.³ The reason sometimes

given for this is, that great inconvenience would follow if a person violating a trust of this kind could be sued by each person in the community.⁴ A better reason, possibly, is, that as the right infringed belongs to the sovereign, as representing the public at large, so the correlative duty is one for the breach of which the sovereign alone can sue.

Officers and agents of the general government, such as postmasters and managers of public works, are not liable for the negligence or other misconduct of their subordinates, unless the latter are the servants of the former and accountable to them alone. Government officers are however liable for the consequences of their own negligence;⁵ and this covers cases of negligence with respect to the conduct of such of their subordinates as are under their supervision and guidance.⁶ For

¹ *Henley v. Lyme Regis*, supra. See *Rhobidas v. Concord*, supra.

² *Hayes v. Porter*, supra. ³ *Blackstone's Com.* i. 220.

⁴ *Wharton, Negligence*, § 286; *Ashby v. White*, Ld. Raym. 938.

⁵ *Clothier v. Webster*, 12 C. B. n. s. 790; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93.

⁶ *Story, Bailment*, § 463; *Schroyer v. Lynch*, 8 Watts, 453; *Wiggins v. Hathaway*, 6 Barb. 632.

example: The defendant, a postmaster, appoints with notice an incompetent person as a clerk to the government in his post-office; and, by reason of the negligence or incompetence of such person, a letter containing \$100 belonging to the plaintiff is lost. The defendant is liable.¹

Officers of the courts are liable for the injurious consequences of such official acts of their own or of their servants as are attributable to want of the care of prudent men in the same situation.² For example: The defendant levies upon a quantity of coal on board a vessel. The coal is left on the vessel, with the master's consent, in charge of a keeper of the defendant, and while so held the vessel is sunk during a gale, with the coal on board, to the damage of the plaintiff, for whom the levy is made. The defendant is liable if he has failed to take such steps for the safety of the coal as a careful, prudent man, well acquainted with the condition of the vessel and its location with regard to exposure to storms, might reasonably be expected to take if the coal belonged to himself.³

A judge however, while acting in a judicial capacity, is not liable for negligence;⁴ and the same is true even of a person acting in a situation which makes him no more than a private arbitrator.⁵ Having submitted a dispute to the decision of an arbitrator, neither party can require him to exercise the skill or care of an expert, unless he has held himself out to possess it, or has agreed to exercise it. For example: The defendant, as broker, makes

¹ See *Wiggins v. Hathaway*, *supra*.

² *Wolfe v. Door*, 24 Maine, 104; *Dunlop v. Knapp*, 14 Ohio St. 64; *Kennard v. Willmore*, 2 Heisk. 619; *Browning v. Hanford*, 5 Hill, 538; *Moore v. Westervelt*, 27 N. Y. 234.

³ *Moore v. Westervelt*, 27 N. Y. 234.

⁴ See *Bradley v. Fisher*, 13 Wall. 335, 350; *Yates v. Lansing*, 5 Johns. 282; *Pratt v. Gardiner*, 2 Cush. 63.

⁵ *Pappa v. Rose*, L. R. 7 C. P. 32, 525; *Tharsis Sulphur Co. v. Loftus*, L. R. 8 C. P. 1. See *Hoosac Tunnel Co. v. O'Brien*, 137 Mass. 424.

a contract for the plaintiff, as follows: ' Sold by order and for account of P, to my principal S, to arrive, 500 tons Black Smyrna raisins — 1869 growth — fair average quality in opinion of selling broker, to be delivered here in London — at 22s. per cwt.,' etc. This contract makes the defendant virtually an arbitrator, to determine between the parties any difference arising between them as to the quality of the raisins tendered in fulfilment of the contract, not stipulating for care or skill on the part of the defendant; and he is not liable for failing to exercise reasonable care and skill in coming to a decision, if he act in good faith, to the best of his judgment.¹

§ 10. PERSONAL ELEMENT IN THE DUTY.

Having regard now to negligence in common form, with the standard of the careful, skilful, or prudent man, it should be remarked that the failure to exercise the required care, skill, or diligence may or may not be a breach of duty to one who sustains damage thereby.² The question whether there has been a breach of duty resolves itself into the question whether there has been a breach of duty to the person who complains of the damage, that is, to the plaintiff; for the statement of the duty as just put imports that the negligence may be a breach of duty, and hence a breach of duty to some particular person.

This further involves two inquiries: first, who owed the supposed duty; secondly, to whom that duty was due. The answer to these two questions will cover much of the ground that remains of the subject of negligence.

The general answer to the first question may be stated thus: (a) he who personally was negligent; (b) he who by his own servant or agent was negligent; (c) he who has employed another to do improper work or proper work which is

¹ *Pappa v. Rose*, supra.

² *Ante*, p. 106.

improperly done. The general answer to the second question: (a) he who was in danger from the negligence of another to whom he stands in a relation of legal right or of sufficient license; (b) he who was in danger from the negligence of another to the knowledge, actual or presumed, of the latter. These general answers will now be examined in order; the first two parts of the first question being passed over and giving place to the third as the only one requiring consideration. This third part (c) relates chiefly to the employment of independent contractors and kindred things.

§ 11. INDEPENDENT CONTRACTORS: CONTROL: 'COL-LATERAL' NEGLIGENCE.

A man may employ another to do work for him on a footing of independence on the part of the latter, concerning ways and means, subject only to the terms of the bargain made, and free accordingly from control by the employer. The person so employed is therefore neither the servant nor, legally speaking, the agent of the one who has employed him. This will be true of all cases of the kind, whatever the business, and however humble, at least in sound principle. Independence of the employer in ways and means is inconsistent with the relation of master and servant or principal and agent; for such relations in themselves, as we have elsewhere seen,¹ are relations of dependence, at least in the sense of a right in the employer to interfere and direct at all times.

In former times this distinction was not always clearly grasped, with the result that the employer was sometimes held liable for the consequences of negligence by persons who are now commonly called independent contractors, as if they were servants or agents.²

The distinction formerly overlooked.

¹ Ante, pp. 54-56.

² *Bush v. Steinman*, 1 Bos. & P. 401; *Hilliard v. Richardson*, 3 Gray, 349; L. C. Torts, 636. Perhaps however the explanation rests on those

But the better view finally prevailed, and such cases were put upon a footing of their own. The employer accordingly is held not liable for damage where the contractor, whether personally or by his servants, was guilty of negligence as a mere matter of detail in the course of the employment, as he would be if the contractor was a servant or an agent of his.¹ This is now the settled doctrine.² For example: The defendant employs a competent independent contractor to repair his chimneys; the latter having entire control over the details of the work, though the former retains the right of control over the premises. In the course of the work, by the negligence of the defendant's servants, bricks fall from the building upon which the work is going on, and hit and injure the plaintiff. The defendant is not liable.³ Again: The defendant, a telephone company, employs an independent contractor to connect with lead and solder certain tubes through which the wires run. To do this it is necessary to create a flare from a benzoline blow-lamp, and the flare cannot be made without applying heat to the lamp. A servant of the defendant uses for the purpose a lamp which he should have known was defective. To heat the lamp quickly, he dips it into a pot of molten solder, whereupon, because of the defect

social changes by which it has become more and more difficult to maintain actions for negligence; as pointed out ante, pp. 68, 69.

¹ *Hilliard v. Richardson*, *supra*; *Boomer v. Wilber*, 176 Mass. 482, 57 N. E. Rep. 1004.

² *Bonaparte v. Wiseman*, 89 Md. 12; *City R. Co. v. Moores*, 80 Md. 352; *Deford v. State*, 30 Md. 179; *Ohio Southern R. Co. v. Morey*, 47 Ohio St. 207; *Boomer v. Wilber*, *supra*; *Hilliard v. Richardson*, *supra*; *Couners v. Hennessey*, 112 Mass. 96; *Gorham v. Gross*, 125 Mass. 232, 240; *Sturges v. Theological Education Soc.*, 130 Mass. 414; *Harding v. Boston*, 163 Mass. 14; *Cuff v. Newark R. Co.*, 6 Vroom, 17; *Brown v. Accrington Cotton Co.*, 3 H. & C. 511; *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, 341, 352, C. A.; *Tenny v. Wimbledon District Council*, 1899, 2 Q. B. 72, C. A.; *Holliday v. National Telegraph Co.*, 1899, 1 Q. B. 221. See ante, pp. 59-61.

³ *Boomer v. Wilber*, *supra*. The negligence was, said the court, in a mere detail of the work. The contract did not contemplate such negligence, and the negligent party is the only one to be held.

in the lamp, an explosion takes place, and the plaintiff, passing by, is hurt. The defendant is not liable.¹

On the other hand the employer will be liable for the negligence of the independent contractor, or of his men, where the employer employed the independent contractor to do improper work, or to do proper work which is improperly done in the sense of being a bad job. The two kinds of negligence may together be called *vice in the work*.² For example: The defendant employs an independent contractor to construct a building of stone, with walls insufficient in prudence to support such a building. The building falls for that reason before it is completed, and the plaintiff sustains damage thereby. The defendant is liable.³ Again: The defendant employs an independent contractor to construct a party-wall between his land and land of the plaintiff, half on the land of each. After the completion of the wall, it falls because of defects in its construction, and the plaintiff suffers damage thereby. The defendant is liable.⁴

This proceeds upon the ground that the duty undertaken by the contractor is really a duty resting upon the employer; and resting upon the employer, it cannot be delegated by him to another without the consent of the person or persons, usually the public, to whom he owes the duty. Thus the employer, if he will have a drain made, or a wall built, owes the duty

Ground of the
doctrine:
delegation of
duty: control:
*vice in the
work.*

¹ *Holliday v. National Telephone Co.*, *supra*. But the Court of Appeal held that, under the circumstances, the contractor employed was not independent, and hence reversed the decision of the Divisional Court. 1899, 2 Q. B. 392.

² See cases in note 2, p. 142.

³ See the doctrine of *Hughes v. Percival*, 8 App. Cas. 443, and *Bower v. Peate*, 1 Q. B. D. 321.

⁴ *Gorham v. Gross*, 125 Mass. 232. Gray, C. J.: 'Where the very thing contracted to be done is imperfectly done . . . the employer is responsible for it.' The distinction is between 'negligence in a matter collateral to the contract and' cases 'in which the thing contracted to be done causes mischief.' *Bonaparte v. Wiseman*, 89 Md. 12, 21. See also, for the ground of the rule, *Ohio R. Co. v. Morey*, 47 Ohio St. 207, 214; *City R. Co. v. Moores*, 80 Md. 352.

to others to have a good and sufficient wall or drain constructed, — a wall that will stand so far as proper construction can make it stand, a drain that will carry off its contents properly. He owes this duty to all persons who may be affected by the construction of a bad drain or wall, in other words by a vice in the work; and he does not rid himself of the duty by employing an independent contractor to do the work, for that is no consent, by the persons harmed, to a bad job.

It will be observed that the duty in question is a duty of one in *control*, not to be negligent therein, rather than the general duty not to be guilty of negligence. The employer, when liable for the independent contractor's negligence, is liable because he cannot divest himself of the duty to exercise control over having a job done that shall be safe to others. He has the right to see that the contractor does not undertake or turn out a dangerous piece of work; for that purpose he is in control, or rather has the *power* of control, over the work, notwithstanding the fact that he has committed the work to an independent contractor. The employer could, for instance, put a stop to the contractor's creating a nuisance of the work; the contractor is in control, at most, only so far as he keeps to a contract which is itself proper.

But in a case of negligence of the first kind spoken of, negligence, that is to say, by the independent contractor (or ^{Collateral} his men) merely, in the course of the employment, and not due to any vice in the work or undertaking, the employer is not in control; it is only a matter of ways and means, of which the contractor is dominus. Negligence of this kind is coming to be called 'collateral' negligence.¹ The distinction between cases of collateral

¹ The term was first used by Lord Blackburn, in *Dalton v. Angus*, 6 App. Cas. 740, 829, and has been adopted in the recent English cases and in many of our own. See *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, 342; *Bonaparte v. Wiseman*, 89 Md. 12, 21; *Ohio R. Co. v.*

negligence and vice in the work rests on the general theory of duty, namely, observable danger which one may avoid. Collateral negligence is not to be foreseen by the employer; that is, danger is not observable. It is plainly otherwise of vice in the work in either of its forms; danger is observable and harm may be avoided.

It may of course be difficult sometimes to determine whether the employer has retained the power to control the person employed, in the absence of terms of control in the contract; and there may accordingly be doubt in regard to the soundness of some of the decisions, especially in regard to cases of humble employment.¹ But such decisions do not impeach the principle. There may be another difficulty in cases in which, while the contractor's calling is naturally an independent one, restrictions are placed upon it which give the employer, or another as his agent, for instance an architect or a superintendent, power at any time to stop, or change, or direct the work. But until the employer exercises his rights under the restriction, the case doubtless stands as if the restriction were not named, and the employer will then be liable or not in accordance with the rules already stated.² For damage due to collateral negligence by the contractor the employer would not be liable.³

Morey, 47 Ohio St. 207; Gorham *v.* Gross, 125 Mass. 232, 240. The subject of the present chapter being negligence, we do not here consider cases of illegal works. See for such cases *ante*, p. 61.

¹ E. g. Bracket *v.* Lubke, 4 Allen, 138, where a carpenter employed to repair an awning is called and treated as a servant of the employer. But surely the carpenter's vocation is 'independent.' See Conners *v.* Hennessey, 112 Mass. 96. This case lays down a general test of independence; which perhaps should not be taken very strictly.

² Miller *v.* Merritt, 211 Penn. St. 127; Frassi *v.* McDonald, 122 Calif. 400; Bibb *v.* N. & W. R. Co., 87 Va. 711; Smith *v.* Milwaukee Exchange, 91 Wis. 360, 51 Am. St. Rep. 912; Railroad Co. *v.* Kimberly, 27 Am. St. Rep. 231; Uppington *v.* New York, 165 N. Y. 222. Qu. whether the last case did not go too far, since the work was known to be dangerous?

³ See the cases just cited; also Hardaker *v.* Idle District Council, 1896, 1 Q. B. 335, which perhaps is a case of the kind; but it was decided on

What has been said in the foregoing paragraphs applies equally to the question of the liability of the employer, or of Sub-contractors. the contractor, for the negligence of a sub-contractor.¹ Liability for *collateral* negligence in such cases has been put thus: 'In ascertaining who is liable for the act of a wrongdoer you must look to the wrongdoer himself, or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable.'²

The doctrine of control leads to some kindred questions. Is the independent contractor himself liable for vice in the work after he has turned over the work to his employer?³ Is a vendor of chattels liable to persons other than the buyer from him, for his own negligence? Is a landlord of leased premises liable to third persons who have suffered damage by reason of any negligent state of the same? These questions in order.

§ 12. COMPLETION OF WORK: SALE OF CHATTEL: LEASE OF PREMISES.

The independent contractor has completed the wall, the drain, the elevator, the gallery, the amphitheatre, the tenement house, and turned over the work to the employer, who accepts it; there is a vice in the work which now causes damage to another; is the contractor liable? If he has contracted for a right of inspection, he may well be; for the right to inspect (and amend, which follows) should give him sufficient power

the ground that there was a vice in the work. And see *Harding v. Boston*, 163 Mass. 14.

¹ *Cuff v. Newark R. Co.*, 6 Vroom, 17; *Rapson v. Cubitt*, 9 M. & W. 710; *Overton v. Freeman*, 11 C. B. 867; *Murray v. Currie*, L. R. 6 C. P. 24; *Bigelow's L. C. Torts*, 657.

² *Murray v. Currie*, L. R. 6 C. P. 24, 27, Willes, J.; *ante*, p. 60.

³ Of course he remains liable for any collateral negligence of his, until the Statute of Limitations exempts him.

of control, unless perhaps the intervals of inspection are so far apart or are hampered by such restrictions as to make the right but nominal. But it should be observed that the contractor's liability rests at the same time upon the assumption that the damage happens to one entitled to exemption from harm by the vice in the work; which is only another way of saying that the contractor must have owed a duty to the particular person hurt.

But suppose that the contractor has no right to inspect? It may be suggested that the contractor will still be liable for the sake of preventing circuity of action.¹ The owner is liable to the person hurt, and the contractor is (or may be) liable over to the owner; therefore the contractor is liable to the person hurt—so would run the argument. But the soundness of the suggestion may be doubted. To make the contractor's liability turn upon his liability to the employer would be to make it subject to any discharge which the employer might see fit to grant him.² The test should be whether the contractor owes a duty to the plaintiff; if he does owe the duty, there is no place for the doctrine of circuity of action; if he does not, no notion of preventing circuity should make him liable.

The case should then stand upon the doctrine of duty. Duty the contractor owed to the plaintiff while the work was in his hands; and that duty he could not then or afterwards delegate³ to the owner in the sense of getting rid of it himself, towards a third person, Delegation of duty : extinction of duty. while otherwise (i. e. apart from the delegation) subject to it. So long as the duty exists, it cannot be delegated, so as to divest the person owing it of its binding force, without

¹ Compare *Lowell v. Spaulding*, 4 CUSH. 277, landlord and tenant, and qu. as to the soundness of the suggestion. See *infra*.

² The contractor's liability may come to an end when the work is done and turned over to the employer, it will be seen; but that is a different thing from making it subject to the will of the employer.

³ There would be no need of delegation to account for the liability of the employer; the nature of his liability we have already seen.

the consent of the person to whom it is owed. But a duty may be *extinguished* in certain ways without such person's consent. Whether completing and turning over the work extinguishes the duty will perhaps turn upon the question whether the vice in the work was intended, or what in the way of negligence comes to the same thing, was due to reckless or wanton disregard of rights.¹ Probably the duty is extinguished, on completion of the work, where the negligence of the contractor was passive, that is, where he did not in fact know of the vice in the work, though he ought to have found it out. The property is by the hypothesis now entirely out of the contractor's control, and may be sold again and again, and if it be a chattel may be carried away and disappear until the contractor, if liable, is called upon for damages.²

The next question is of the liability of the vendor of a chattel to one who did not buy from him, for damage caused by his

Remote vendor of dangerous articles. negligence in respect of the chattel. This question usually arises in relation to the effect of the chattel's passing through other hands before it reaches the plaintiff, and in that aspect is considered further on.³ It will perhaps be enough at this place to say that for negligence in the sense of want of due care, that is want of knowledge when one should know, or passive negligence, and that *alone*, the vendor's liability does not extend to others than the buyer and those who, according to the clear purpose of the seller and the buyer,⁴ are to use the chattel. The sale and delivery of the chattel puts the article out of the seller's

¹ Compare *Maynard v. Boston R. Co.*, 115 Mass. 458, Gray, C. J.; *Southcote v. Stanley*, 1 H. & N. 247, Bramwell, B.

² On the general subject of liability in such cases see *Thomas v. Winchester*, 6 N. Y. 397; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; *Devlin v. Smith*, 89 N. Y. 470; *Empire Laundry Co. v. Brady*, 164 Ill. 58; *Swan v. Jackson*, 55 Hun, 194 (denying right of action in favor of a stranger to the contract).

³ *Infra*, § 17.

⁴ *Langridge v. Levy*, 2 M. & W. 519; s. c. 4 M. & W. 338.

control and also, in cases of mere passive negligence, destroys the duty; unless the very dangerous nature of the chattel imposes a special duty upon the vendor, — of which in another section.¹

The last question is of the liability of a landlord of leased premises to third persons who have suffered damage by reason of the defective condition of the premises, due to negligence. But it must first be asked, whose negligence it was, the landlord's or the tenant's, unless it was the negligence of both. For if the landlord was not negligent, he cannot, it seems, be liable for the negligence of a tenant over whom he has no control.² There certainly may be negligences touching the premises for which the landlord, not being in control or having notice, cannot be responsible, as for leaving open a scuttle in the sidewalk for half an hour.

It may be however that the damage was caused by a condition of the premises for which the landlord would be liable to the plaintiff regardless of the question whether the premises were let and out of his possession. Thus the damage may have been caused by the defective condition of the eaves of a house overhanging the street, whereby pipes fall from the same and strike one passing along in the highway. The landlord would be liable in such a case, if he had notice that the premises were in that state; for the owner of premises owes to the public, and to every member thereof, the duty to have his premises in safe condition for those who are passing in the highway, so far as by diligence he can. The highway must be safe and the landlord must not negligently make it unsafe, or after notice permit it to remain unsafe even in

Lease of premises : duty of lessor.

¹ Infra, § 17.

² Query of tenancy at will? The landlord may put an end to the lease, but otherwise he has no control over the premises. While the tenancy continues the landlord has no more control or power of control than he would have if the tenancy were for a term of years. It should seem therefore that the text covers such cases.

the hands of his tenant. He does not get rid of this duty by leasing his premises and thus putting them out of his hands. He would no doubt have sufficient power of control to enter and repair, unless the lease forbade; but even if the lease took away his right of repair, he would be liable, because he could not get rid of his duty to the plaintiff by contract with the tenant.¹ Sale alone would put an end to his duty.

It is not clear, where the premises fall into disorder by the negligence of the tenant alone, whether the landlord would be liable for damage done before having notice of the state of things. Probably he would not be, because the duty of control, which includes the duty of repair, appears to be a duty not to be guilty of negligence in the matter; the duty of control is not neglected if there be no reason to suppose that anything is wrong.

It will be seen from what has already been said that the common way of putting the rule of liability in cases of landlord and tenant, to wit, that the landlord is liable if the defective condition of the premises was due to his negligence, though true in certain cases,² is too broad.³ Still, while it is true that the tenant is or may be⁴ liable if he was negligent in the matter, the landlord also may be liable; enough that the landlord as well as the tenant owed a duty to the person suffering damage. And in cases in which the landlord has assumed, what apart from contract would rest upon the tenant, the duty of ordinary repair, the landlord may, it seems, be liable for the negligence of the tenant alone touching repairs

¹ The duty to repair rests, in the absence of stipulation otherwise, on the tenant; and the tenant being accordingly bound to repair is liable for the neglect, whether the landlord is also liable or not. See *Lowell v. Spaulding*, 4 *Cush.* 277; *Fisher v. Thirkell*, 21 *Mich.* 1.

² See *Fisher v. Thirkell*, 21 *Mich.* 1; *Miller v. Hancock*, 1893, 2 *Q. B.* 177, C. A.; *Nelson v. Liverpool Brewery Co.*, 2 *C. P. D.* 311; *Todd v. Flight*, 9 *C. B. n. s.* 377.

³ *Cavalier v. Pope*, 1906, A. C. 428, affirming 1905, 2 *K. B.* 757.

⁴ The tenant would not be liable if he owed no duty to the plaintiff, as where the latter entered only as a customer or guest of the landlord.

(though not for the tenant's negligence in other respects);¹ but in principle not, even in such a case, to customers or guests or the wife² of the tenant, for to them he owes no duty of the kind under consideration.³

The question of liability will be complicated where there is a mixed tenancy between the landlord and tenant, or perhaps where the landlord has let a building in parts to several tenants with common entrances, hallways, and the like.⁴ In the first of the two cases it seems that where the plaintiff was not hurt by reason of any duty which the landlord owed to the public (as where the premises were unsafe for persons passing in the highway), the general test of the landlord's liability is whether the plaintiff entered on business with him or by his invitation. If the plaintiff entered on business with, or by invitation of, the tenant, the tenant alone is liable, if either is.⁵ As for the case of a building let in parts to several persons, with right to use common entrances and hallways, it may be that the landlord, by assuming the duty of care over such places, should be held liable for the defective condition of them to customers of the tenants;⁶ but that is a question of the person to whom the duty of care is due, rather than of the person who owes the duty.

It has been suggested that the ground of the landlord's liability for his tenant's negligence, where he is liable for it,

¹ See *Fisher v. Thirkell*, *supra*; *Lowell v. Spaulding*, 4 *Cush.* 277.

² *Cavalier v. Pope*, *supra*.

³ See e. g. *Burner v. Higman*, 127 *Iowa*, 580.

⁴ See *Lane v. Cox*, 1897, 1 Q. B. 415, C. A., *supra*; *Elliot v. Pray*, 10 *Allen*, 378 (post, p. 167); *Gordon v. Cummings*, 152 *Mass.* 513; *Marrowedel v. Cook*, 154 *Mass.* 235; *Burner v. Higman*, 127 *Iowa*, 580. Or where a railway company has let its property and yet kept control of the running of the cars. *Chesapeake R. Co. v. Howard*, 178 U. S. 153, *infra*.

⁵ See *Lane v. Cox*, *supra*; *Roche v. Sawyer*, 176 *Mass.* 71; *Burner v. Higman*, *supra*.

⁶ See *Burner v. Higman*, 127 *Iowa*, 580, 590; *Showinger Co. v. Mann*, 219 *Ill.* 242, 245; *Burke v. Hulett*, 216 *Ill.* 545.

rests upon the ground of preventing circuity of action. But that may be doubted,¹ as in the matter before considered,² except in regard to cases in which the landlord has assumed the duty of the tenant to make ordinary repairs. The true ground in general appears to be the duty of the landlord to the plaintiff; the question of liability accordingly being direct.

§ 13. CARE OF PREMISES.

In this section, the duty of the owner or occupant of premises to the *plaintiff*, for damages sustained thereon, by reason of the condition of the premises, is to be stated. The question of the existence and nature of the duty turns more or less upon the consideration of the occasion which brought the plaintiff there; that is, whether the plaintiff was a trespasser, a bare licensee, an invited licensee, a customer-licensee, or a licensee by law.³ The question must therefore be considered with reference to each of these situations.

The owner or occupant of premises owes no duty of care or diligence to keep his premises in repair for the purposes of trespassers. In other words, it is no breach of duty to a trespasser that a man's premises were, by reason of his 'passive' negligence,⁴ in a dangerous state of disorder, whatever the consequences to the former. But this rule of law must not be understood as declaring that the occupant or owner owes *no* duty to trespassers with regard to the management of his premises. He has no right even towards such persons to maim them, as by savage beasts, hidden guns, or missiles.⁵ For example: The defendant has a savage dog on his premises, which he care-

¹ *Lowell v. Spaulding*, 4 CUSH. 277.

² *Ante*, p. 147.

³ For the cases of servants, see § 14.

⁴ *Ante*, p. 110.

⁵ *Talmage v. Smith*, 59 N. W. Rep. 656 (Mich.).

lessly allows in the daytime to run at large unmuzzled, having notice that the dog is savage. The plaintiff, having strayed upon the premises without permission, while hunting, is attacked and bitten by the dog. The defendant is deemed liable.¹ Again: The defendant sets a spring-gun in his grounds to 'catch' persons entering thereon without permission, and fails to give notice of the particular danger. The plaintiff while trespassing on the premises is injured by the gun, having no notice of danger. The defendant is liable.²

More than that, while the owner of premises is not bound to exercise care or diligence to keep his premises in repair for trespassers, he does owe the duty, even to such persons, not to suffer them to receive harm by reason of any improper condition of them if he knows that a trespasser is in danger thereby and can give him warning. For the owner, with knowledge that a person is in danger of harm from fault of his, the owner's, to do nothing, would show want of ordinary regard for, in other words, wanton or reckless disregard of, the person's safety, one of the forms of negligence already referred to.³ In such a case, that person would have a legal

¹ *Loomis v. Terry*, 17 Wend. 496, an extreme case.

² *Bird v. Holbrook*, 4 Bing. 628. As to notice now, see 24 & 25 Vict. c. 100, § 31. If, in the absence of statute, the trespasser had *knowledge* of the danger, or if a man entered in the night-time with a felonious intent, he (probably) 'assumed the risk' (see § 14) and could not recover; though even in such cases the owner of the premises would not be justified in purposely inflicting greater harm than would be necessary for the protection of his property and the expulsion of the intruder. See the two cases last cited; also *Ilott v. Wilks*, 3 B. & Ald. 308; *Woolf v. Chalker*, 31 Conn. 121.

³ *Shea v. Gurney*, 163 Mass. 184; *Gay v. Essex R. Co.* 159 Mass. 238; *Vanderbeck v. Hendry*, 34 N. J. 467; *Delaware R. Co. v. Reich*, 61 N. J. 635; *Herrick v. Wixom*, 121 Mich. 384; *Clark v. Manchester*, 62 N. H. 577; *Ritz v. Wheeling*, 45 W. Va. 262; *Maynard v. Boston & M. R. Co.*, 115 Mass. 458, *Gray, C. J.*; *Massell v. Boston Elevated Railroad*, 191 Mass. 491, 493; *Claridge v. So. Staffordshire Tramway Co.*, 1892, 1 Q. B. 422, fast driving. See *ante*, p. 88. The owner of premises who, by conduct, entertainments, or other attractions thereon, naturally draws children there owes to them a duty of the kind, according to the better view. *Union Pacific*

right to proper warning, which, but for the owner's knowledge of his danger, he would not have apart from statute or from some menace to safety, of purpose, by the owner.¹ The sort of negligence for which the owner is not liable to trespassers, want of care or diligence in regard to the condition of his premises, is accordingly passive negligence; the sort for which he is liable, active negligence.²

A bare licensee, as the term is here used, is one who enters another's premises, or is upon some particular part of the same,³ without request or inducement of the occupant, but still under circumstances from which he has come to suppose a permission; as in the case of persons accustomed, without interference, to cross a line of railway in no definite track,⁴ or possibly of persons crossing an open field on a foot-path, commonly used by

Who are meant by bare licensees: R. Co. v. McDonald, 152 U. S. 262; Siddall v. Jansen, 168 Ill. 43; Pekin v. McMahon, 154 Ill. 141; Haesley v. Winona R. Co., 46 Minn. 233; Harriman v. Pittsburgh R. Co., 45 Ohio St. 11; Schmidt v. Kansas City Distilling Co., 90 Mo. 284. But see Grindley v. McKechnie, 163 Mass. 494; Walsh v. Fitchburg R. Co., 145 N. Y. 301; Bates v. Nashville R. Co., 90 Tenn. 36. The question is whether the duty arises because children are naturally attracted to the premises or only because the defendant was guilty of wanton disregard of their presence, that is, was guilty of active negligence. If they were mature, it might well be held that the defendant owed no greater duty than to an ordinary trespasser; but the duty might justly rise higher as to children of very tender years.

¹ See Bird v. Holbrook, *supra*, and the note following, and compare cases of gift, loan, or bailment of chattels which are defective or otherwise dangerous; the giver, lender, or bailor not being liable for damage unless he knew of the danger and did not give warning. Coughlin v. Gillison, 1899, 1 Q. B. 145, C. A.; Indermauer v. Dames, L. R. 1 C. P. 274 (s. c. L. R. 2 C. P. 318); Farrant v. Barnes, 11 C. B. n. s. 553, 564; *ante*, p. 122. If the act was a mere gratuity, the owner could not be required to enlarge his gift by making the chattel perfect; the most that could be demanded would be that he should give warning if he knew of the bailee's danger.

² *Ante*, p. 110, as to these terms, and see Southcote v. Stanley, 1 H. & N. 247, Bramwell, B., as to the second.

³ See Batchelor v. Fortescue, 11 Q. B. D. 474.

⁴ Harrison v. Northeastern Ry. Co., 29 L. T. n. s. 844.

the neighbors, but without any right of way.¹ A person so doing, is not indeed in a position to require the owner or occupant of the land to exercise care in regard to the management or the state of the premises;² but such a person probably occupies a more favorable position than a trespasser. He can, of course, insist that the occupant shall let loose no savage beast upon him, set no traps in his way without giving him fair notice,³ or permit him to suffer harm there, knowing that he is in danger.⁴ But further it should seem that, if it were usual for people to pass over the occupant's premises in the night-time, he could require the occupant to exercise reasonable care with regard to the keeping of vicious animals, of whose propensity to do harm the occupant has notice.

And it may be that some special duty has been assumed by the occupant, or has been imposed by law upon him, as in the case of a railway company to sound a whistle at certain places, or to keep gates shut while trains are passing; this too would modify the question of liability.⁵ For example: The defendant, a railway company, has a rule that a whistle shall be sounded by express trains at a certain point where, with the acquiescence of the company, persons are accustomed to cross its track. The plaintiff's intestate attempts to cross at the point in the night, while a train is standing still in such a position, according to some of the evidence, as to prevent any one from seeing an approaching

¹ *Morrow v. Sweeney*, 38 N. E. Rep. 187 (Ind.).

² *Batchelor v. Fortescue*, 11 Q. B. D. 474; *Morrissey v. Eastern R. Co.*, 126 Mass. 377; *Sweeny v. Old Colony R. Co.*, 10 Allen, 368; *Means v. Southern California Ry. Co.*, 144 Calif. 473; *Schmidt v. Bauer*, 80 Calif. 565; *Central Pacific R. Co. v. Henigh*, 23 Kans. 347; *Frost v. Eastern R. Co.*, 64 N. H. 220; *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301; *Morgan v. Hallowell*, 57 Maine, 375.

³ See *Hart v. Cole*, 156 Mass. 475, 477.

⁴ *Southcote v. Stanley*, 1 H. & N. 247.

⁵ *Dublin & Wicklow Ry. Co. v. Slattery*, 3 App. Cas. 1155; *North-Eastern Ry. Co. v. Wanless*, L. R. 7 H. L. 12, as to open gates; *Williams v. Great Western Ry. Co.*, L. R. 9 Ex. 157, open gates.

express train, and is run over and killed. There is evidence, but it is contradicted, that a whistle was duly sounded, and there is evidence that the train carried lights. A jury may find the defendant guilty of breach of duty to the deceased.¹

A bare licensee can insist upon the occupant's keeping his premises in a safe condition in another particular. A man has no right to render the highway dangerous or less useful to the public than it ordinarily is; if he *should* do so, he is liable as for a nuisance to any one who has suffered damage thereby.² And a bare licensee on the wrongdoer's premises will be entitled to recover for any damage sustained thereby. For example: The defendant digs a pit adjoining the highway, and fails to fence it off from the street. The plaintiff, while walking along the street, in the dark, accidentally steps a little aside in front of the pit, and falls into it, thereby sustaining bodily injury. The defendant's act in leaving the place unguarded makes it a public nuisance, and he is liable for the injury received by the plaintiff.³

If however the pit, though near, were not substantially adjoining the highway, so that the plaintiff must have been a trespasser before reaching it, he could not treat the omission of the defendant to fence as a breach of duty. For example: The defendants, being possessed of land near to an ancient common and public footway, construct a reservoir for receiving the back-wash of water at the lock of a canal owned by them. The plaintiff's intestate sets out by night along this footpath for Sheffield. The path runs alongside the canal for about three hundred yards to a point at which it is bounded on one side by a lock, and on the other by the reservoir. At this point the pathway turns to the right over

¹ Dublin & Wicklow Ry. Co. v. Slattery, *supra*. See also *Davey v. Southwestern Ry. Co.*, 12 Q. B. Div. 70, affirming 11 Q. B. D. 213; *Gray v. Northeastern Ry. Co.*, 48 L. T. n. s. 904.

² Post, chapter on Nuisance.

³ *Barnes v. Ward*, 9 C. B. 392. But see contra, *Howland v. Vincent*, 10 Met. 371, in which however the point appears to have been overlooked that the defendant's act amounted to a public nuisance. And see *Damon v. Boston*, 149 Mass. 147.

a bridge, crossing the by-wash. A person continuing straight on in the direction of the pathway, and not turning to the right to go over the bridge, would find himself (if not prevented by the arm of a lock) upon a grassy plat about five yards long by seven broad, between the lock and the by-wash, level with, but somewhat distant from, the footpath; the plat being unfenced, and having a fall of about three yards to the water. On the morning following the setting out of the deceased, he is found drowned at this point. The defendants are not guilty of a breach of duty in not fencing the place, since it is not substantially adjoining the highway, and the deceased must have become a trespasser before reaching the reservoir.¹

The same will be true of injury sustained by straying cattle or horses.² For example: The defendant digs a pit in his waste land within thirty-six feet of the highway, and the plaintiff's horse escapes into the waste and falls into the pit and is killed. The defendant has violated no duty to the plaintiff.³ Again: The plaintiff's horse strays upon the defendant's railway track and is killed by negligence (short of wantonness, i. e. active negligence) of the defendant's servants. The defendant is not liable.⁴

If the licensee entered or acted by direct invitation of the occupant, the situation may become very different. In such cases the occupant owes a duty to the licensee, not merely to restrain his ferocious animals, and

Invitation.

¹ *Hardcastle v. South Yorkshire Ry. Co.*, 4 H. & N. 67. See *Dinks v. South Yorkshire Ry. Co.*, 3 Best & S. 244; *Houndsell v. Smyth*, 7 C. B. N. S. 731.

² *Blyth v. Topham, Croke*, Jac. 158; *Maynard v. Boston & M. R. Co.*, 115 Mass. 458.

³ *Blyth v. Topham, supra*.

⁴ *Maynard v. Boston & M. R. Co.*, *supra*. See *Taft v. New York R. Co.*, 157 Mass. 297. See however *Charman v. Southeastern Ry. Co.*, 21 Q. B. Div. 524, under statute. Wanton injury in such cases would create liability. *Maynard v. Boston & M. R. Co.*, *supra*; *Eames v. Salem R. Co.*, 98 Mass. 560; *ante*, pp. 107, 108.

to prevent injury from dangerous concealed engines, and to guard against nuisances adjoining the highway, but also, unless the invitation was for mere hospitality or benevolence or friendship, to keep his premises in reasonable repair, and to refrain from negligence generally; otherwise, he will be liable for any injury sustained by the licensee, not caused by the latter's own act. In other words, the owner or occupant is bound, except in cases of hospitality or the like, to exercise reasonable care to prevent damage from unusual danger, of which he has, or ought to have, knowledge.¹

This is true even in respect of gratuitous privileges touching public and quasi-public ways, such as railways and road-

Public and quasi-public ways. ways for entering one's premises. For example: The defendants, a railroad corporation, have a private crossing on their land over their railroad,

at grade, in a city, which crossing they have constructed for the accommodation of the public; and they keep a flagman stationed there to prevent persons from crossing when there is danger. The plaintiff coming down the way to the crossing with horse and wagon is signalled by the flagman to cross, and on proceeding, according to the signal, to cross the track, is run against by one of the defendants' engines, the flagman having been guilty of carelessness in giving the signal. This is a breach of duty, and the defendants are liable for the damage sustained.² Again: The defendant, owner of land, having a private road for the use of persons coming to his house, gives permission to a builder engaged in erecting a house on the land, to place materials on the road. The plaintiff, having occasion to use the road in the night, for the purpose of going to the defendant's residence,

¹ *Bennett v. Louisville R. Co.*, 102 U. S. 577; *Siddall v. Jansen*, 168 Ill. 43; *Holmes v. Drew*, 151 Mass. 578; *Baker v. Tibbetts*, 162 Mass. 468; *Engel v. Smith*, 82 Mich. 1; *West v. Thomas*, 97 Ala. 622; *Richmond R. Co. v. Moore*, 94 Va. 493.

² *Sweeny v. Old Colony R. Co.*, 10 Allen, 368. See *Holmes v. Drew*, 151 Mass. 578. As to the discontinuance of a gatekeeper see *Cliff v. Midland Ry. Co.*, L. R. 5 Q. B. 258.

runs against the materials and sustains damage, without fault of his own. The defendant is liable; having held out an inducement to the plaintiff.¹

The gist of the liability in such cases consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that the way was intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way was adapted and prepared or allowed to be so used.² The real distinction therefore is this: A mere passive acquiescence by an owner or occupier in the use of a way over his land by others, may involve no liability for negligence; but if, directly or by implication, he induce persons to enter upon his roadway for purposes not merely of hospitality or the like, he thereby assumes an obligation to keep it in a safe condition, suitable for such use, and must not be guilty even of passive negligence. For a breach of this obligation he is liable in damages to a person injured thereby.³

It was urged in the authority in which this doctrine was laid down (a point worthy of notice here) that, if the defendants were liable in such a case, they would be made to suffer by reason of the fact that they had taken precautions to guard against accident at a place which they were not bound to keep open for use at all, and that the case would thus present the singular aspect of a party liable for neglect in the performance of a duty voluntarily assumed, and not imposed by law. The answer was, that this was no anomaly. If a person, it was observed, undertake to do an act, or to discharge

¹ *Corby v. Hill*, 4 C. B. n. s. 556. If this was a case of mere hospitality on the part of the defendant, qu. whether it would now be followed. But it appears to stand on the ground of roadways. See *infra*.

² *Sweeny v. Old Colony R. Co.*, *supra*, Bigelow, C. J.

³ *Id.* See also *Bolch v. Smith*, 7 H. & N. 736, 741.

a duty, by which the conduct of others may properly be regulated, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be properly performed shall not suffer loss or injury by reason of his negligence.¹ The liability in such cases does not depend upon the motives or considerations which induced a party to take on himself a particular duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed.² In other words, one may in certain cases be compelled to enlarge one's gift; the only help being not to make the gift.

It should be noticed however that this doctrine, as applied to gratuitous permission and invitation, is limited to special objects, such as private crossings over railways, and private roadways, which men have been led to suppose that they have a right to use. Having led the plaintiff so to act, the defendant cannot say that the plaintiff was only a licensee. The subject appears indeed to have started on the broader basis, that invitation, if actual, created of itself a duty to have the premises in fit condition for the purpose, so far as might be by due care or diligence;³ but legal theory has changed, and the doctrine has been limited to cases like those just mentioned.⁴ Very likely those cases are only examples of the limitation.

In relation to other cases it is now held that regard must be had to the nature of the invitation. If the licensee is in-

¹ See *Dublin & Wicklow Ry. Co. v. Slattery*, 3 App. Cas. 1155; *Cliff v. Midland Ry. Co.*, L. R. 5 Q. B. 258.

² *Sweeny v. Old Colony R. Co.*, supra, Bigelow, C. J.

³ See *Sweeny v. Old Colony R. Co.*, supra, Bigelow, C. J.; *Gordon v. Cummings*, 152 Mass. 513, 515, Devens, J.

⁴ *Plummer v. Dill*, 156 Mass. 426; *Hart v. Cole*, id. 475, 478. These cases accordingly distinguish *Sweeny v. Old Colony R. Co.*, supra, and like decisions.

vited only as a guest or friendly visitor or for benevolence, he enters on no better footing, so far as the present question is concerned, than if he were a bare licensee; ^{Nature of the invitation a material consideration.} he cannot hold the owner or occupant to any duty of care or diligence beyond giving notice of any danger of which he is aware.¹ Difficulty will sometimes arise in determining the nature of the invitation, — whether it is one purely of hospitality or benevolence, or not; for it will occasionally happen that other motives, perhaps stronger ones, will be united with the first, as for instance where the harm befell the plaintiff at a corner-stone laying, or at a college celebration, a religious conference,² or the like. But it seems that, where there is an element of benefit expected by the owner of the premises or other licensor, the invitation carries with it the duty not to be guilty of negligence, active or passive, in regard to danger.

Where the harm arises by reason of a defective condition of the occupant's premises, it must be shown that the occupant had notice of the defect before the damage was sustained;³ this in order to show a duty to ^{Notice of defect.} be met. For example: The defendant is proprietor of a hotel, containing in one of the passageways a glass door, the glass in which has gradually become loosened and insecure; but the defendant is not aware of the fact, nor is he in fault for not knowing it. The glass falls out as the plaintiff opens the door, and the plaintiff, a visitor merely, is injured. The defendant is not liable.⁴

The case of a person entering upon the premises of another as a customer, on purposes of business, is a stronger ^{Customers.} one against the occupant than that of a person

¹ See the cases just cited.

² See *Davis v. Central Congregational Soc.*, 129 Mass. 367, an extreme case of the kind.

³ *Welfare v. London & B. Ry. Co.*, L. R. 4 Q. B. 693; *Southcote v. Stanley*, 1 H. & N. 247.

⁴ *Southcote v. Stanley*, *supra*.

invited to enter for hospitality, friendship, or benevolence. A greater degree of care ought to be taken to protect such a person than one to whom only an invitation was given. This is no gift, to be enlarged; it may even be the *duty* of the customer to enter, and not merely his convenience. A master may require his servant to go to a neighboring shop for provisions; an officer may be required to enter upon premises to make a levy. And the right to protection should and does cover both entering and leaving the premises.¹

It is clear that the owner or occupant of the premises owes to customers the duty to keep the premises in such repair or condition as to enable them to go thereon for the transaction of their business in the usual manner of customers; and that, if injury happen by reason of the improper state of the premises, of which fact the occupant has notice, he will be liable. Or, as the rule has been stated from the bench, the owner or occupant of premises is liable in damages to those who come to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the premises or of the access thereto, which is known by him and not by them, and which he has negligently suffered to exist, and has given them no notice of.² For example: The defendant, proprietor of a brewery, leaves a trap-door in a passageway within his premises, leading to his office, open and unguarded by night, and the plaintiff's wife, in going through the passageway by night for purposes of business with the proprietor, falls, without fault of her own, down the hole and is killed. The defendant is liable.³

In accordance with the principle stated, the proprietors of

¹ Chapman v. Rothwell, El. B. & E. 168, *infra*.

² Carleton v. Franconia Iron Co., 99 Mass. 216, Gray, J. Where the plaintiff, knowing the state of things, cannot recover, is it because he 'assumes the risk'? So it seems. Must the plaintiff then have *appreciated* the risk, as in the case of a servant? Or is mere knowledge enough?

³ Chapman v. Rothwell, El. B. & E. 168; Freer v. Cameron, 4 Rich. 228.

a wharf, established for the use of the public, are liable for injury sustained by a vessel by reason of the dangerous condition of the place of landing, known to the proprietors of the wharf and carelessly allowed to remain, and not known to the plaintiff. For example: The defendants, owners of a wharf at tide-water, procure the plaintiff to bring his vessel to it to be there discharged of its cargo, and suffer the vessel to be placed there, at high tide, over a rock sunk and concealed in the adjoining dock. The defendants are aware of the position of the rock and of its danger to vessels; but no notice of its existence is given, and the plaintiff is ignorant of the fact. With the ebb of the tide, the vessel settles down upon the rock and sustains injury. The defendants are guilty of a breach of duty and are liable for the damage.¹

The question of the occupant's liability in cases like this, will be affected by the consideration whether the injured party was fairly authorized under the circumstances to go upon the particular part of the premises at which the accident happened. If the place was one which customers usually frequent without objection, it will be assumed that the party was authorized to go there. For example: The defendant, owner of a shop, situated upon a public street, let the upper stories thereof to another; and an entrance to the shop directly in front of the stairs which lead above is so constructed and kept constantly open that it is used for passage for persons going upstairs. There is a trap-door between the entrance and the stairs; and the plaintiff entering the place on business with the defendant, and in the exercise of due care, falls through the trap, the same being open, and is injured. The defendant is guilty of a breach of duty in leaving the trap-door open, and is liable to the plaintiff.²

If however a customer is injured by reason of the bad condition of a portion of the premises not open to the public,

¹ *Carleton v. Franconia Iron Co.*, *supra*; *The Moorecock*, 13 P. D. 157; affirmed 14 P. Div. 64.

² *Elliot v. Pray*, 10 Allen, 378. See post, p. 167, of mixed tenancy.

and no invitation or inducement has been held out to him by the owner or occupant to go there, he cannot recover for injury sustained there, though the place be frequented by the servants of the occupant. For example: The defendants are owners of a foundry, on the front door of the outer part of which is placed the sign 'No admittance.' The plaintiff enters the outer building to inquire after certain castings of his, and the defendant tells him that they are nearly ready, and sends a workman into the foundry part of the building to see about them. The plaintiff follows the workman, though not invited, and though none but persons employed there go into the foundry, falls into a scuttle, and is injured. The defendant is not liable.¹

This duty to customers however requires the occupant to use due care over all parts of his premises and their appurtenances to which the customer has need of access in the performance of the business. For example: The defendants, owners of a dock, provide a gangway for passage from the plaintiff's vessel; the gangway being in an insecure position, to the knowledge of the defendants, but not to the knowledge of the plaintiff. The plaintiff is injured while properly passing over the same. The defendants are liable.²

Workmen too on ships in dock, though not the servants of the dock owner, are deemed to be invited by him to use the dock and all appliances provided by him as incidental to the use of the dock.³ Indeed, the owner

¹ *Zoebisch v. Tarbell*, 10 Allen, 385.

² *Smith v. London Docks Co.*, L. R. 3 C. P. 326.

³ *Heaven v. Pender*, 11 Q. B. Div. 503, 515. A broad rule of liability in negligence cases was laid down at p. 509 by Lord Esher, broader than the other judges were willing to accept. But it was considered correct in *Thrussell v. Handyside*, 20 Q. B. D. 359, 363. The rule of Lord Esher was thus stated: 'Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a

of premises may be liable, though the business was not transacted by the plaintiff in the usual way or place, provided he could not so do it conveniently, and was not prohibited from doing it as he did; the defendant or his servant seeing him at the time. The plaintiff is not deemed a bare licensee in such a case.¹

Where the injury has been sustained, not by reason of any improper condition of the defendant's premises, but by a fall down an ordinary stairway, or the like, the defendant is not guilty of negligence in leaving a door open or in failing to give notice of the place where danger lies.² Fall down stairway.

In regard to this class of cases, it is to be observed that, if there is no actual invitation to the injured person to go upon the premises in question, in order to recover damages for injury sustained he must have gone upon the premises for business with the occupier.³ But this is not enough. A man has no right to intrude himself upon another, even for purposes of business. The business which will justify an entry upon the premises, and entitle the party to damages for injuries sustained, must, in the absence of an express invitation, or an engagement for services, be the business of the *occupant*, including business which he is bound to attend to.⁴ A shopkeeper is bound to use due diligence to keep his premises in fit condition for persons who go to him to buy, but not for peddlers who go

Business of occupier of land.

duty arises to use ordinary care and skill to avoid such danger.' That would make an occupant of premises liable for passive negligence. For what *Heaven v. Pender* decides see *Cann v. Wilson*, 39 Ch. D. 39, 42. But *Cann v. Wilson* is overruled by *Le Lievre v. Gould*, 1 Q. B. 491.

¹ *Holmes v. Northeastern Ry. Co.*, L. R. 4 Ex. 254; s. c. L. R. 6 Ex. 123, Exch. Ch.

² *Wilkinson v. Fairrie*, 1 H. & C. 633; *Gaffney v. Brown*, 150 Mass. 479.

³ *Collis v. Selden*, L. R. 3 C. P. 495; *Hart v. Cole*, 156 Mass. 475, 477; *Tebbutt v. Bristol & E. Ry. Co.*, L. R. 6 Q. B. 73, 75.

⁴ *Hart v. Cole*, ut supra.

to sell;¹ unless indeed they are persons with whom he is accustomed to deal and whom he expects to come into his shop. So likewise, under the same circumstances, he would probably be liable for harm to a creditor, or his servant, who went into his shop to demand payment of a debt due,² but not to a beggar.

Customers, within the meaning of the foregoing paragraphs, appear to be persons with whom one is *accustomed* to

Meaning of term 'customer.' have dealings, together with such as one has or seeks any particular dealing with. Besides these

there are persons who may be called quasi-customers, who, entering for the benefit of the occupant, may be considered as presumptively invited by him, and accordingly stand on the same footing as customers. This class will include postmen,³ policemen,⁴ and perhaps firemen.⁵ Officers, certainly, entering by request of the occupant, on *business*, may recover for damage due to the occupant's passive negligence.⁶ This should be equally true of persons entering under license of law, whether actually commanded to enter or not.⁷

¹ *Hart v. Cole*, 156 Mass. 475.

² See *Indermaur v. Dames*, L. R. 1 C. P. 274; L. R. 2 C. P. 318.

³ *Gordon v. Cummings*, 152 Mass. 513, letter-box for tenants of defendant, on defendant's premises.

⁴ *Learoyd v. Godfrey*, 138 Mass. 315; *Parker v. Barnard*, 135 Mass. 116.

⁵ *Parker v. Barnard*, 135 Mass. at p. 119; *Gibson v. Leonard*, 37 Ill. App. 344, 32 N. E. Rep. 182; *Woodruff v. Bowen*, 136 Ind. 431; *Hamilton v. Minneapolis Manuf. Co.*, 78 Minn. 3. But see cases in note 7, infra. There is difficulty sometimes in deciding whether a person is to be considered as standing on the footing of a customer. What, for instance, is to be said of a person travelling, by a free pass, on a railroad? See *Quimby v. Boston & M. R. Co.*, 150 Mass. 365, and the cases therein reviewed; *Rogers v. Kennebec Steamboat Co.*, 29 Atl. Rep. 1069 (Maine); *Griswold v. New York R. Co.*, 53 Conn. 371. A newsboy requested to come aboard a street car by a passenger who wishes to buy a newspaper is a trespasser. *Massell v. Boston Elevated Railroad*, 191 Mass. 491.

⁶ Cases in note 3, supra.

⁷ *Parker v. Barnard*, 135 Mass. at p. 119. But see *Gibson v. Leonard*,

Another question deserves consideration, namely, of the liability of the landlord of leased premises to customers of the tenant in a case in which he would be liable to one of his own customers. The landlord may or may not owe a duty to them. He may owe the duty to such persons not to be guilty of 'active' negligence, as for instance where, actually knowing that his premises are in unsafe and improper condition, he invites them to enter, or sees them enter, without giving them warning. For 'passive' negligence however it seems that the landlord would not be liable. For example: The defendant lets an unfurnished house the staircase of which is then in a dangerous condition due to the defendant's negligence. The plaintiff enters the premises by request of and for the tenant, to move some furniture. While doing this, he is hurt by reason of the defective condition of the staircase. The defendant is not liable.¹

Landlord and
tenant : cus-
tomers of
tenant : duty
to repair.

This doctrine however is distinct from the question of the liability of the landlord where the duty to repair, by contract with the tenant or otherwise, rests upon the landlord. Liability *may* fall on the landlord in such a case, even when the damage is done to a customer of the tenant. Thus the landlord will be liable when, having let a building (for instance in flats) to several, with common hallways and staircases, he has reserved or taken upon himself the care, as usually he would do, of such places — he will be liable to customers of the tenants who have sustained damage by reason of his negligence in respect of such duty.²

37 Ill. App. 344, 32 N. E. Rep. 182; Beehler *v.* Daniels, 27 L. R. A. (R. I.) 512. There appears to be no such distinction in cases of license by law as prevails in license by the party, touching what may be called orders or ranks of license (bare licensees, invited licensees, etc.).

¹ Lane *v.* Cox, 1897, 1 Q. B. 415. See Roche *v.* Sawyer, 176 Mass. 71.

² Miller *v.* Hancock, 1893, 2 Q. B. 177, C. A.; Marwedel *v.* Cook, 154 Mass. 235, 236; Plummer *v.* Dill, 156 Mass. 426, 428; Gordon *v.* Cummings, 152 Mass. 515.

§ 14. MASTER AND SERVANT: 'ASSUMING THE RISK.'

As a servant, when upon his master's premises, is there by express invitation of the master, the master should and does owe a duty to him to exercise reasonable care, skill, and diligence in regard to the condition of the place, except in so far as the servant may have exempted his master from that duty. The exception is now the subject for consideration, and may be thus stated: the servant exempts his master from the duty in question¹ when he 'assumes the risk,' as the phrase is; which means, that, when the servant takes the risk freely and willingly,—as a willing man, 'volens,'—he cannot maintain an action against his master for what happens from the exposure. It is a case of consent; *volenti non fit injuria*.

The duty of the master towards his servant may now be more fully stated thus: Except in so far as the servant has assumed the risk, the master must exercise reasonable care, skill, and diligence, in the following things,—to have and keep his premises in safe condition for the servant, and, according to the employment, to provide and keep constantly for him safe ways, works, machinery, tackle, appliances, and the like, and competent men, and none but competent, to carry on the service with him.² And this duty cannot be

¹ A moral duty on the part of the master may no doubt remain, but it is of imperfect obligation. *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 158, 159; *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 136; *Yarmouth v. France*, 19 Q. B. D. 647, 657.

² See *Texas R. Co. v. Archibald*, 170 U. S. 665 (as to cars of other railroads); *Hanley v. California Bridge Co.*, 127 Calif. 232 (safe place for work); *Hennessey v. Bingham*, 125 Calif. 627 (safe place); *Channon v. Sanford Co.*, 70 Conn. 573 (safe place); *North Chicago R. Co. v. Dudgeon*, 184 Ill. 477 (safe place); *Crown v. Orr*, 140 N. Y. 450; *Bailey v. Rome Lt. Co.*, 139 N. Y. 302; *Toy v. United States Cartridge Co.*, 159 Mass. 313; *Illick v. Flint R. Co.*, 67 Mich. 632; *Fink v. Des Moines Ice Co.*, 84 Iowa, 321; *De Pauw Co. v. Stubblefield*, 132 Ind. 182; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *Southwest Improvement Co. v. Andrew*, 86 Va. 270. On the duty to give warning see *Fox v. Kinney*, 72 Conn. 404.

delegated, so as to exempt the master; it is personal.¹ Accordingly, if the servant suffer damage by reason of failure in any of these things, the master will be liable. For example: The defendants employ the plaintiff to lay bricks for them, which must be carried up over a scaffold erected for the purpose by the defendants. The materials supporting the scaffold are in unfit condition, to the knowledge of both parties. The defendants personally, or by servants in charge, direct the plaintiff to go upon the scaffold, and the plaintiff does so, but not volens; the supports give way, and the plaintiff is thrown down and seriously hurt. The defendants are liable.² Again: The defendant, a maker of cartridges, sets the plaintiff, one of his servants, to work at a machine so constructed as to call for frequent replacing of one of its constituent parts; defect in such part being a defect in the machine. The defendant fails to have the part replaced on a particular occasion, when by reasonable care in inspection he might have known replacing was needed, and have made the change; and the plaintiff, exercising due care, sustains injury by the failure. The defendant is guilty of breach of duty to the plaintiff.³ Again: The defendants are proprietors of a cotton mill, in which the plaintiff is employed by them. Part of one of the machines in the carding-room consists of a grooved pulley, over which a chain passes. To one end of the chain a weight is hung. An extra weight is hung by a raw-hide lacing to a hook fastened in the same chain. This latter weight did not come with the machine, and is not specially intended as a weight. It has been in use in aid of the machine however for two years, though not continually,

¹ *Leonard v. Kinnare*, 174 Ill. 532; *Railway v. Shields*, 47 Ohio St. 387; *Toy v. United States Cartridge Co.*, *supra*; *Fink v. Des Moines Ice Co.*, *supra*.

² *Roberts v. Smith*, 2 H. & N. 213; *s. c. L. C. Torts*, 684, Exch. Ch.

³ See *Toy v. United States Cartridge Co.*, 159 Mass. 313, 315, language, in effect, of Morton, J. ‘The duty of seeing that such parts are not defective is one incumbent on the master. It is not a matter of ordinary repair from day to day, which may be intrusted to a servant,’—that is, so as to exempt the master. *Id.*

and the machine works successfully, though not so well, without it. Because of want of reasonable care on the part of the defendants, the lacing breaks, and the extra weight falls upon and injures the plaintiff while properly working at the machine. The defendants are guilty of breach of duty to the plaintiff.¹

When does the servant assume the risk, so as to exempt the master from the duty in question? The answer must be Assuming the risk. distributed under two heads: first, in regard to risks assumed in the contract of service; second, in regard to risks otherwise assumed.

In virtue of the contract of service the servant presumptively assumes the ordinary risks of the service; by which is meant the risks incident to the business, or, in other words, the risks without which it would be impracticable to carry on the business;² *presumptively*, for it is possible that a servant might stipulate that he should not take certain of these risks. But apart from actual stipulation in regard to some special risk, it is immaterial in this class of cases whether or not the servant *knew* of the risk in question; he assumes all risks incident to the business, but what these are in particular he cannot, in the nature of things, know. This is a distinctive feature of cases of the kind.

The risks which are incident to the business will cover the ordinary condition of the premises, while the work is going on, and being brought to a close, or being put in order. It is obvious that during such time the premises, especially those within which extensive industries are carried on, must be more or less in disorder; pieces of machinery, tools, tackle, and other things used in the business must be 'out of place' much of the time; elevators, shoots, and trap-doors will, sometimes, in the pressure of business, be left open and un-

¹ *Rice v. King Philip Mills*, 144 Mass. 229.

² *Crown v. Orr*, 140 N. Y. 450; *De Graffe v. New York Central R. Co.*, 76 N. Y. 125; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614.

guarded; these and other exposures of a dangerous character, according to the business, must, speaking of servants, be allowed.¹ The greater part of such a state of things might not be negligence at all; some of it, such as the leaving open and unguarded, elevators, shoots, and trap-doors, might be a breach of duty towards a customer,² while towards a servant of the proprietor it would not. The servant assumes the risk in regard to damage from acts or omissions for which the master would be liable to a stranger.³

It is plain inference that the risk thus assumed is the risk of negligence on the part of a fellow-servant, so far as that risk is 'ordinary,' for 'assuming the risk' does not mean assuming the risk of the *master's* negligence, except in cases to be mentioned, and the servant cannot complain if he has suffered by reason of his own negligence. But in point of law the servant is deemed to have assumed the extraordinary⁴ as well as the ordinary risks of negligence on the part of his fellow-servants; no distinction *here* is drawn between the two kinds of risk. Indeed, at common law, all risks of negligence by a fellow-servant, not due to the master, are treated as 'ordinary.' It has accordingly been laid down as broad doctrine, at common law, that a servant cannot complain against his master of damage sustained by the negligence of a fellow-servant, where the master himself was not at fault.⁵ For example: A switch-tender of the defendants, a railroad company, who is deemed

Ordinary and
extraordinary
risks.

¹ See *Murphy v. American Rubber Co.*, 159 Mass. 266, slippery floor.

² *Indermaur v. Dames*, L. R. 1 C. P. 274; s. c. L. R. 2 C. P. 318, Exch. Ch., a very important authority.

³ *Id.* at pp. 679, 680, of L. C. Torts. See also *Thomas v. Quartermaine*, 18 Q. B. Div. 685.

⁴ See L. C. Torts, 679, Willes, J.

⁵ *De Freest v. Warner*, 98 N. Y. 211; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *Farwell v. Boston R. Co.*, 4 Met. 49; *Pittsburgh R. Co. v. Devinney*, 17 Ohio St. 197; *Northern Pacific R. Co. v. Poirier*, 167 U. S. 48 (brakeman and conductor of railroad train are fellow-servants); *Baltimore R. Co. v. Baugh*, 149 U. S. 368; *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 692. This last case has been somewhat discussed on the point actually decided by it, but its general language is not disputed.

a fellow-servant of the plaintiff, negligently leaves open one of his switches, by reason of which an engine of the defendants runs off the track and injures the plaintiff, the evidence showing that the defendants themselves are not guilty of negligence in any way. The defendants are not liable.¹

While, however, the master is (at common law) exempted from liability in such cases, — on the ground that, because **Fellow-servants.** the servant has assumed the risk, the master is so far relieved of duty, — the courts have not agreed in the definition of the term ‘fellow-servant.’ By some of our courts, and by those of England, the term is declared to include all persons who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, even though in different grades or departments of it.² Others of our courts exclude the last clause (concerning different grades or departments of the work) from the definition; the plaintiff being held entitled to recover if the injury was caused by a servant working in a higher grade or in a different department of the service,³ as for instance if the servant in a *higher* grade were a sort of vice-principal.⁴

This subject however is now very generally regulated by statute (Employers’ Liability Acts), the general effect of

¹ *Farwell v. Boston R. Co.*, *supra*, leading case in this country.

² *Farwell v. Boston R. Co.*, *supra*; *De Freest v. Warner*, *supra*; *Linooski v. Susquehanna Coal Co.*, 157 Penn. St. 153; *New England R. Co. v. Conroy*, 175 U. S. 323, and *Baltimore R. Co. v. Baugh*, 149 U. S. 368, overruling *Chicago Ry. Co. v. Ross*, 112 U. S. 377.

³ *Pittsburgh R. Co. v. Devinney*, 17 Ohio St. 197, 210; *Chicago Ry. Co. v. Ross*, 112 U. S. 377, now overruled by *New England R. Co. v. Conroy*, *supra*. The doctrine of fellow-servants (exempting the master) does not apply to cases in which the master has committed to a servant any of those duties before mentioned which rest upon the master personally.

⁴ As to that aspect of the case see *New England R. Co. v. Conroy*, *supra*; *St. Louis Ry. Co. v. Touhey*, 67 Ark. 209; *Denver R. Co. v. Sipes*, 23 Col. 226; *Woodson v. Johnston*, 109 Ga. 454; *Sievers v. Peters Box Co.*, 151 Ind. 642.

which, speaking freely, is to overturn the rule that by the contract of service the servant presumptively assumes the risk of negligence on the part of his fellow-servants; though the rule still obtains that if the servant, in point of fact, voluntarily assumes a risk he exempts the master so far from his duty, and hence from liability for the consequences of the exposure. The maxim *volenti non fit injuria* still applies.¹ These statutes vary more or less in details, and cannot be considered further here.

Statute :
*maxim of
consent not
affected.*

Thus far of the risks which the servant is presumed to have assumed. The presumption against him arises because the risks are ordinary and incident to the business. Extraordinary risks stand upon a different foot-ing; no presumption arises from entering the service that the servant undertook these.² Still he may have done so. He may, in point of fact, have assumed the risk of a certain unfit condition of the premises, or of the works or appliances, — that is, of the master's negligence, or, even under the Employers' Liability Acts, of the negligence of a fellow-servant

In this class of cases the servant must have *known* of the risk; but even knowledge is not enough. ' *Scienti*' is not equivalent to ' *volenti*'.³ For example: The defendants are contractors doing work above the floor where the plaintiff is directed by his employer to work, the place of the plaintiff being one of exposure by reason of the nature of the work which the defendants are doing, and the plaintiff being aware of the exposure but not incurring it voluntarily. By the defendants' negligence a piece of iron is dropped upon and

¹ *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 136.

² *Consolidated Coal Co. v. Haenni*, 146 Ill. 614.

³ *Thrussell v. Handyside*, 20 Q. B. D. 359, 364; *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 692; *Yarmouth v. Framer*, 19 Q. B. Div. 647, 659; *Osborne v. Northwestern Ry. Co.*, 21 Q. B. D. 220.

injures the plaintiff. The defendants are liable, the plaintiff's knowledge not amounting to consent.¹

But if the servant, *at the time of making the contract*, knew² of the existence of a particular extraordinary danger, and also fully appreciated³ the same, his entering into the contract amounts to assuming the risk.⁴ That is, just as, by entering the service, the servant assumes the ordinary risks, and exempts his master so far from duty, so now, by entering the service knowing and appreciating the nature of an extraordinary risk, he assumes that risk, and exempts his master from duty in regard to it.⁵ For example: The defendants are a gaslight company, having a quantity of coal to be wheeled under sheds to a certain place, over high, narrow 'runs,' not provided with guards on the sides. The plaintiff enters into the defendants' service, to wheel coal over the

¹ *Thrusell v. Handyside*, *supra*, distinguishing *Woodley v. Metropolitan Ry. Co.*, 2 Ex. Div. 384, and other cases.

² Some dicta put it thus: If the servant knew, or had the *means* of knowledge, etc. *Crown v. Orr*, 140 N. Y. 450. But the latter clause should be omitted; it is inconsistent with requiring full appreciation of the danger.

³ *Ciriack v. Merchants' Woollen Co.*, 151 Mass. 152; *Nofsinger v. Goldman*, 122 Calif. 609. Nor does it apply where the harm was due to the combined negligence of the master and a fellow-servant. *Chicago R. Co. v. Gellison*, 173 Ill. 264. If for any reason the servant did not fully appreciate the danger, as for instance from mental deficiency or from inexperience, he has not consented. *Ciriack v. Merchants' Woollen Co.*, *supra*; *Consolidated Stone Co. v. Summit*, 152 Ind. 297. As to the master's duty to a servant under age, see *Alabama R. Co. v. Marcus*, 115 Ala. 389.

⁴ Knowing the risk is not assuming it. *Dallemand v. Saalfeldt*, 175 Ill. 310; *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 696, Bowen, L. J. See however *Stalder v. Huntington*, 153 Ind. 354, 368; *Wabash R. Co. v. Ray*, 152 Ind. 392, 400.

⁵ *Crown v. Orr*, 140 N. Y. 450; *Kaare v. Troy Steel Co.*, 139 N. Y. 369; *White v. Witteman Lithographic Co.*, 131 N. Y. 631; *De Forest v. Jewett*, 88 N. Y. 264; *Gibson v. Erie Ry. Co.*, 63 N. Y. 449; *Ragon v. Toledo R. Co.*, 97 Mich. 265; *s. c. 91 Mich. 379*; *Illick v. Flint R. Co.*, 67 Mich. 632; *Batterson v. Chicago Ry. Co.*, 53 Mich. 125; *O'Neal v. Chicago Ry. Co.*, 132 Ind. 110; *Hayden v. Manuf. Co.*, 29 Conn. 548; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *Kohn v. McNulta*, 147 U. S. 238.

runs, knowing that they are not provided with guards, and fully appreciating the danger, and in carefully wheeling over the same falls off the side, and is injured. The plaintiff assumed the risk, and cannot recover even under the Employers' Liability Act (in regard to defective ways, works, or machinery).¹ Again: The defendants are a railroad company, having had in their employ the plaintiff's intestate. The deceased was killed by being thrown from a hand-car, which he and other servants of the defendants were propelling on the defendants' road. One handle of the walking-beam of the car was broken several weeks before, but the defendants' servants continue to use the car, using the handle of a pick or a crowbar in place of the broken part. A crowbar is being used on the day of the accident, when a train coming up behind on the same track, the servants, including the deceased, try to run the car to a distant switch, instead of removing it to another track. The men work the machinery with great force; five being engaged, two more than usual. This wrenches and breaks the lever or beam, and the plaintiff's intestate is thrown under the car and killed. The deceased had full knowledge and appreciation of the defect, and voluntarily continued in the service, without making objection. The defendants owed no duty in the matter to the plaintiff's intestate; he assumed the risk.² Again: The defendant is receiver of a railroad company, in which the plaintiff's intestate had been employed as switchman and car-coupler for nearly two years in the company's freight-yard. This yard is drained by many small open ditches, running across the tracks between the ties, all of which are in plain sight, were well known to the deceased, and existed when he entered the service. While coupling

¹ *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135; *Kaare v. Troy Steel Co.*, 139 N. Y. 369.

² *Powers v. New York R. Co.*, 98 N. Y. 274. The servant should know the danger as well as the defects before he can be said to have assumed extraordinary risks. *Consolidated Coal Co. v. Haenni*, 146 Ill. 614.

cars in the yard, the deceased steps into one of the ditches, falls, and is killed by the cars. The deceased assumed the risk.¹

Further, the servant may have assumed the risk of extraordinary dangers arising after the contract was made, and not

Extraordi- **nary risks** **arising after** **the contract.** embraced in the contract of service at all; it is a question of fact whether he did. And the question, as in all other cases of extraordinary dangers, is whether he exposed himself freely, knowing and fully appreciating the danger. If he did he cannot recover against his master. For example: The defendants, proprietors of a woollen mill, send the plaintiff to a dimly lighted part of a room therein, between running gear of the machinery so placed that it might easily catch the plaintiff's clothing and pull him into the wheels. The machinery in that part of the room is in plain sight. The plaintiff has not however been employed in that part of the room; he is not warned of the danger, though warning might have been given; but he goes to the place freely, his clothing is caught in the machinery, and he is hurt. The plaintiff, if he knew and fully appreciated the danger, assumed the risk, and the defendants are not liable.²

Where the extraordinary danger was contemporaneous with the contract of service, the plaintiff consents to the risk, as

Extraordi- **nary risks** **contempora-** **neous with** **contract.** we have seen, if he then knew and fully appreciated the danger; his consent to the risk follows from his entering the service with knowledge and appreciation of the danger.³ But where the extraordinary danger arises afterwards, the servant's knowledge and appreciation of it, and then incurring the *danger*, do not necessarily constitute consent, even though he did not

¹ *De Forest v. Jewett*, 88 N. Y. 264. See *Gibson v. Erie Ry. Co.*, 63 N. Y. 449; *Kohn v. McNulta*, 147 U. S. 238.

² *Ciriack v. Merchants' Woollen Co.*, 151 Mass. 152.

³ *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155; *Mahoney v. Dore*, id. 513; *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135.

protest, object, or complain.¹ For example: The defendant, a boarding-house keeper, employs the plaintiff, in June, as a domestic servant. A flight of stairs leads from the kitchen of the defendant's house, on the outside of the same, to the back yard, down which the plaintiff has to go in the course of her service. The stairs are open and uncovered on the side towards the back yard, but covered overhead, except that a skylight there has, before the plaintiff's service began, lost several panes of glass. It is now March, and rain, snow, and sleet have come in and fallen upon the stairs. The steps in consequence are icy. The weather is cold, and it is snowing. It is evening; the stairway is not lighted, though the plaintiff has been over it during the day, and knows its condition and fully appreciates the danger. She attempts to go down, in the discharge of her duties as servant, taking hold of the railing, trying to go safely, and exercising due care, but slips, falls, and is hurt. It cannot be held as matter of law that the plaintiff assumed the risk; whether she did assume it or not is a question of fact, and it may be found that she did not go freely, in which case the defendant owes a duty to the plaintiff which has been broken.²

It cannot have escaped notice that the expression 'assuming the risk' is used in the law in a technical and hence special sense. In popular speech it is common to say that one has 'taken the risk,' or, 'run the risk,' when the meaning merely is that one has incurred a great danger, as where one rushes before an approaching railway train to save a child on the track.³ It is

Assuming the
risk a tech-
nical term.

¹ See however *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 112.

² *Mahoney v. Dore*, 155 Mass. 513. See also the similar cases of *Fitzgerald v. Connecticut River Paper Co.*, id. 155, and *Osborne v. London Ry. Co.*, 21 Q. B. Div. 220.

³ See *Eckert v. Long Island R. Co.*, 43 N. Y. 502. The rescue of a child in this case was treated on the footing of a question of negligence in the plaintiff's intestate, killed in the act, not as a question of assuming the risk. A majority of the court held that under the circumstance the deceased had not been guilty of negligence; the distinction being taken between attempts to save life and attempts to save property.

not ordinarily meant in such cases that the person exposing himself to danger has assumed the risk in the sense of exempting the one in control from the duty of care, as we have seen is the legal meaning of the expression.¹

A final and important remark should be made. The doctrine under consideration is not a doctrine of contributory negligence. The servant, or indeed one not a servant, may assume the risk so as to bar any right of action by him, though he was not in the least negligent at the time.² Contributory negligence, which in fact often exists in these cases, makes an additional and distinct defence. The language of the authorities however sometimes fails to observe the distinction.³

§ 15. CONTRIBUTORY FAULT.

Generally speaking, it is a defence to an action of tort that negligence or other wrongdoing on the part of the plaintiff 'contributed' to produce the damage of which he complains.⁴

¹ The rule as to trespassers and bare licensees may, it seems, be put upon the ground of assuming the risk.

² *Mellor v. Merchants' Manuf. Co.*, 150 Mass. 362, 363.

³ Note a want of clearness on this point in *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 158, 159.

It may be added that the principles relating to the subject of assuming the risk, as set forth above, are now recognized, except as affected by statute, by most if not all of our courts, though in the application of them more or less conflicting dicta may be found, and some conflicting conclusions. The cases are innumerable.

⁴ *Murphy v. Deane*, 101 Mass. 455. In some States the plaintiff in a suit for negligence has to prove that he was not guilty of contributory fault. He must show that he was exercising due care. *Id.*; *McLane v. Perkins*, 92 Maine, 39; *Getman v. Delaware R. Co.*, 162 N. Y. 21; *Banks v. Braman*, 188 Mass. 367. But this is unnecessary if the defendant was guilty of wanton and reckless conduct, or gross negligence in that sense. Such a case is like a wilful, intentional wrong. *Banks v. Braman*, *supra*, at p. 370; *Magar v. Hammond*, 183 N. Y. 387. 'Such a wrong is a cause so independent of previous conduct of the plaintiff . . . that this previous conduct cannot be considered a directly contributing cause of the

The reason of this lies in the consideration that a man is not liable for damage which he has not caused;¹ or, conversely, the law holds men liable for those wrongs alone which they have caused. If the defendant did not, either personally, or by another under his express or implied authority, cause the damage, he is not liable; and it is part of the plaintiff's case to show that the defendant wholly caused the damage of which he complains.² Now if there intervened between the act or omission of the defendant (where that is not wanton and reckless, or really gross negligence)³ and the damage sustained, an independent act or perhaps omission, whether of negligence or other wrongdoing, which, in the sense of a cause, contributed to effect the damage, it follows that the misfortune might not have happened but for that act or omission; and hence the plaintiff cannot prove that the defendant wholly caused the harm.

Meaning of
the term :
proximate
and remote
causes.

But an act or an omission may be said to 'contribute' to a result as well when it does not stand in the relation of a cause to that result as when it does; and the term 'contribute' or 'contributory' is in fact sometimes used of situations in which there is no connection of cause and effect recognized by law, that is, in cases in which the contributory act or omission is not '*causa proxima*' as it must be to have any legal consequences, but is only '*causa remota*.' '*Causa proxima, non remota, spectatur.*' When the term in question is used in this broader sense, it will then be necessary to understand that only such contributory act or omission as may be considered a proximate cause⁴ of the misfortune com-

injury.' *Banks v. Braman, Knowlton, C. J.; Aiken v. Holyoke Street Ry., 184 Mass. 269.*

¹ The word 'cause' when here used alone = 'proximate cause.'

² *Murphy v. Deane, supra.* The liability of a master for the (in fact) unauthorized torts of his servant, or of a principal for the like torts of his agent, stands on special grounds.

³ *Banks v. Braman, 188 Mass. 367, supra; Aiken v. Holyoke Street Ry., 184 Mass. 269; Magar v. Hammond, 183 N. Y. 387.*

⁴ Not necessarily as the only one.

plained of can bar the action. But the stricter use of the term *as causa proxima* is the more common and better use. In some cases the situation may be such that the plaintiff cannot recover even when the defendant's fault was adequate to produce the injury without the plaintiff's negligence, as in certain cases of collision where the fault on each side is contemporaneous.¹ But in no case can the plaintiff recover where the evidence falls *short* of showing that the defendant's act or omission proximately caused the injury.

On the other hand, conditions (remote causes) must not be confounded with proximate causes.² The mere fact that a person or his property is in an improper position, ^{Conditions distinguished.} when, if he had not been there, no damage would have been done to him, does not preclude him from recovering.³ Such circumstance is only a condition to the happening of the damage, not a cause of it.⁴ The misfortune may have been a very unnatural and extraordinary result of the situation, not to be foreseen in the light of ordinary events; and, when that is the case, the fact that the person or property was in the particular situation is not in contemplation of law a cause of the damage. A man may in the daytime fall asleep in the country highway, or leave his goods there, and recover for injury by another's driving carelessly over him or them; since, though the position occupied is a condition to the damage, the damage is not the natural result of the act.⁵

The law therefore considers whether the conduct of the plaintiff had a natural tendency, such as exists between cause

¹ *Murphy v. Deane*, 101 Mass. 455, 464, 465; *Brember v. Jones*, 67 N. H. 374.

² *Newcomb v. Boston Protective Dept.*, 146 Mass. 596.

³ *Id.* ⁴ *Id.*

⁵ See the remarks of Parke, B., in *Davies v. Mann*, 10 M. & W. 546, 549. It is sometimes laid down that the proximate or legal cause is found in the last negligent act or omission contributing to the damage, without which the harm would not have occurred. *Schwartz v. Shull*, 45 W. Va. 405. But that is making conditions do the work of causes.

and effect, to place the party or his property in the direct way of the danger which resulted in the disaster. If it had not, it did not, in the sense of a cause, contribute to the injury. Such is the legal theory of contributory negligence or other fault as a bar to an action for tort. For example: The defendant sails a vessel in such a careless manner as to cause a collision with another vessel on which the plaintiff is a passenger; the plaintiff at the time standing in an improper place for passengers, to wit, near the anchor, which is struck by the defendant's boat and caused to fall upon the plaintiff's leg breaking it. The defendant is liable; the plaintiff's standing in the improper position not contributing, in the stricter sense, to the injury, since it would not be the natural and probable result that one standing there would be hurt by a collision.¹ Again: The defendant driving carelessly along the highway runs against and injures the plaintiff's donkey, straying improperly therein, and fettered in his forefeet so as not to be able to move with freedom. This is a breach of duty to the plaintiff; the latter's act not contributing, in the same sense, to the damage.² Again: The plaintiff's vehicle, improperly placed in the highway, is run into negligently by the defendant's team. The plaintiff is not entitled to recover because of the position of his vehicle.³

Natural
tendency of
conduct the
test.

In accordance with the same principle, a traveller may be riding a horse or in a carriage which he had no right to take or use, or on a turnpike without payment of toll, or with a speed forbidden by law, or upon the wrong side of the road;⁴ or his horses may be standing in the street of a town, without his attending them and keeping them under his command

¹ *Greenland v. Chaplin*, 5 Ex. 243. Or, as Pollock, C. B., suggested, the plaintiff could not have foreseen the consequences of standing where he did; that is, such consequences were unusual, not the common effect of such an act.

² *Davies v. Mann*, 10 M. & W. 546.

³ *Newcomb v. Boston Protective Dept.*, 146 Mass. 596.

⁴ *Brember v. Jones*, 67 N. H. 374.

as the law requires; in none of these cases is his right of action for any injury he may sustain by the negligent conduct of another affected by these circumstances. He is none the less entitled to recover, unless it appear that his own negligence or other wrongdoing contributed as a proximate cause to the damage.¹

This is equally true though the plaintiff is a positive trespasser, as the examples elsewhere given of men injured by savage dogs or spring-guns while trespassing by day upon the defendant's premises clearly show;² for it is not the natural or usual effect of trespassing in the daytime (not feloniously) that the party should be bitten by a savage dog not known to be there, or maimed by the discharge of a hidden gun. Wrongful acts or omissions cannot be set off against each other, so as to make the one excuse the other, unless they stand respectively in the situation of true causes to the damage.

In this connection attention may be called to certain cases of injury sustained on Sunday through the defendant's negligence by a plaintiff engaged in acts neither of ~~Sunday~~ necessity nor of charity; in other words, in acts rendered unlawful by statute. By most of the courts it is held that the plaintiff is not thereby precluded from recovering for damage sustained, in the absence of explicit language to that effect in the statute; and this on the ground that the mere doing of the illegal act is not, or may not be, contributory in the proper sense to the damage sustained.³ For example: The defendant, a town, bound to keep a certain bridge in repair, negligently allows it to get out of order; and the plaintiff, without notice of the condition of the bridge,

¹ *Norris v. Litchfield*, 35 N. H. 271, Bell, J.

² *Bird v. Holbrook*, 4 Bing. 628; *Loomis v. Terry*, 17 Wend. 496; *ante*, p. 153, note.

³ *Sutton v. Wauwatosa*, 29 Wis. 21; *Mohney v. Cook*, 26 Penn. St. 342; *Corey v. Bath*, 35 N. H. 530; *Carrol v. Staten Island R. Co.*, 58 N. Y. 126.

in attempting to drive cattle over it to market on Sunday breaks through the bridge, several of his cattle being killed and others hurt thereby. The defendant is guilty of a breach of duty to the plaintiff, and liable to him for the damage sustained; the violation of the Sunday law not properly contributing to the result, since it is not the natural or usual result of travelling on Sunday that damage should follow.¹

This is clearly correct in principle, in the absence of language of the statute plainly intended to prohibit all actions for damage sustained on Sunday, except such as is caused without any violation of law by the injured party; but the contrary rule prevails, or has prevailed, in some of the States.² This contrary rule however is considerably narrowed by the courts which adhere to it. It is considered not to apply to cases in which the defendant has misused property of the plaintiff hired on Sunday.³ So too it is held that one who is walking on the highway on Sunday, simply for exercise or fresh air, may recover against a town for negligence whereby he has sustained damage.⁴

It will however be difficult sometimes to determine whether the fact or facts in question amount to a legal cause or only to a condition of the misfortune; and the courts may, for that very reason, be disposed to cut the matter short by laying down a positive rule of law covering the question.⁵ Thus in the Federal courts, and in some States, contrary to the rule in others, the

Difficulties:
special rules:
'stop, look
and listen.'

¹ *Sutton v. Wauwatosa*, *supra*.

² *Bosworth v. Swansea*, 10 Met. 363; *Jones v. Andover*, 10 Allen, 18; *Connolly v. Boston*, 117 Mass. 64. See however *Newcomb v. Boston Protective Dept.*, 146 Mass. 596, which in principle is opposed to these cases. The law of the State has been changed by statute recently.

³ *Hall v. Corcoran*, 107 Mass. 251, overruling *Gregg v. Wyman*, 4 Cush. 323, on authority of which *Wheldon v. Chappel*, 8 R. I. 230, was decided. See also *Woodman v. Hubbard*, 25 N. H. 67; *Morton v. Gloster*, 46 Maine, 520.

⁴ *Hamilton v. Boston*, 14 Allen, 475. See further *Cox v. Cook*, *id.* 165; *Feital v. Middlesex R. Co.*, 109 Mass. 398.

⁵ See ante, pp. 114, 115, and notes.

law requires one to 'stop, look and listen' before crossing a steam or an electric railway or a highway; failure to do so is accordingly, by *prima facie* presumption, contributory negligence barring an action.¹ But such cases are not to be taken as invalidating the general theory of contributory negligence.

It is laid down in certain cases that, if the plaintiff could have avoided the disaster by the exercise of 'due care,' he is not entitled to complain of the negligence of the defendant.² This is not intended however to suggest a general test of liability. In the case of the fettered donkey above stated, the plaintiff might have avoided the effect of the defendant's negligence by keeping his animal at home, but he was still held entitled to recover. The meaning of the rule in question is that in the moment of actual peril the plaintiff must not be guilty of failing to

¹ *Mankewicz v. Lehigh Valley R. Co.*, 214 Penn. St. 386; *Kreamer v. Perkiomen R. Co.*, id. 219; *Railroad Co. v. Houston*, 95 U. S. 697; *Northern Pacific R. Co. v. Freeman*, 174 U. S. 379; *Baker v. Kansas City R. Co.*, 147 Mo. 140; *Connolly v. New York R. Co.*, 158 Mass. 8; *Cole v. New York R. Co.*, 174 Mass. 537; *Robbins v. Springfield Street Ry. Co.*, 165 Mass. 30 (drawing a distinction between steam and electric or horse railways); *Creamer v. West End Street Ry.*, 156 Mass. 320 (the same distinction); *Cawley v. La Crosse R. Co.*, 101 Wis. 145 (applying the rule to electric railways), and cases cited; maintaining the 'stop, look and listen' rule. *Contra*, *Judson v. Central Vermont R. Co.*, 158 N. Y. 597; *Lawler v. Hartford Street Ry. Co.*, 72 Conn. 74; *Atlantic City R. Co. v. Goodin*, 45 L. R. A. 671 (N. J.) and cases cited. Compare *Herbert v. Southern Pacific R. Co.*, 121 Calif. 227; *Niosi v. Empire Laundry*, 117 Calif. 257 (crossing highway); *Chicago Ry. Co. v. Lowell*, 151 U. S. 209. And see *Chicago R. Co. v. Pearson*, 184 Ill. 386; *Harvard Law Rev.*, Nov. 1899, p. 226; *ante*, p. 114, note. The cases affirming the rule require one to stop, look and listen, or to show a sufficient reason for not doing so in case of omission. *Baker v. Kansas City R. Co.*, *supra*. The cases contra leave it to the jury to determine, on the facts, without any presumption, whether the plaintiff was guilty of contributory negligence or not.

² *Haley v. Case*, 142 Mass. 316, 321; *Ferren v. Old Colony R. Co.*, 143 Mass. 197; *Ciriack v. Merchants' Woollen Co.*, 151 Mass. 152; *s. c.* 146 Mass. 182; *Russell v. Tillotson*, 140 Mass. 201; *Butterfield v. Forrester*, 11 East, 60; *Bridge v. Grand Junc. Ry. Co.*, 3 M. & W. 244; *Davies v. Mann*, 10 M. & W. 546; *Tuff v. Warman*, 5 C. B. n. s. 573, Exch. Ch.; *Caswell v. Worth*, 5 El. & B. 849.

exercise such reasonable care under the circumstances as he can, to protect himself against damage. Being at hand at the moment, the plaintiff might be able to prevent harm, and must govern himself accordingly.

One who however in a sudden emergency loses presence of mind through the misconduct of the defendant, and while in such loss, and owing to it, falls into danger and is hurt, is not thereby guilty of want of due care or of contributory negligence. The defendant's unlawful act has caused the loss of presence of mind, and what happens afterwards is but the natural effect of the act.¹ For example: The defendant is carelessly driving an express wagon along the sidewalk of the street of a city, at a rapid rate, which suddenly comes up behind the plaintiff, when she instinctively springs aside to escape danger, and in so doing strikes her head against the wall of a building, and is hurt. The defendant is liable.² Again: The defendant, a railway company, negligently leaves the gates of a level-crossing open, and the plaintiff is thereby misled into crossing, supposing it to be safe to cross, but not using his faculties as well as he might have done under other circumstances; and he is hurt by a passing train. The defendant is liable.³

On the other hand, it is laid down in certain cases that the plaintiff may be entitled to recover, if the *defendant* might, by the exercise of 'due care' on his part, have avoided the consequences of the negligence of the plaintiff.⁴ This too cannot be intended to suggest a general

¹ Coulter *v.* American Express Co., 56 N. Y. 585; Getman *v.* Delaware R. Co., 162 N. Y. 21. See also Johnson *v.* West Chester Ry. Co., 70 Penn. St. 357; Galena R. -Co. *v.* Yarwood, 17 Ill. 509. Compare The Bywell Castle, 4 P. Div. 219. But see Meyer *v.* Boepple Co., 83 N. W. Rep. 809 (Iowa).

² Coulter *v.* American Express Co., *supra*.

³ Northeastern Ry. Co. *v.* Wanless, L. R. 7 H. L. 12; Sweeny *v.* Old Colony R. Co., 10 Allen, 368. See Davey *v.* Southwestern Ry. Co., 12 Q. B. Div. 70; Dublin & Wicklow Ry. Co. *v.* Slattery, 3 App. Cas. 1155.

⁴ Tuff *v.* Warman, 5 C. B. n. s. 573, Exch. Ch., leading case.

test of liability. In the case of one who in the want of due care has fallen through a trap-door left open by the defendant negligently, the defendant clearly might have avoided the consequence of the plaintiff's negligence by having closed the door; and yet he is not liable. The meaning of the rule is that where the plaintiff was not at hand, so as to prevent the damage, the defendant will be liable if by due care he might have prevented the harm and did not exercise it. The question would be proper in a case like that of the fettered donkey.¹ For example: The defendant is pilot of a steamer on the Thames, which runs down the plaintiff's barge. There is no look-out on the barge, but there is evidence that the steamer might easily have cleared her. It is proper to leave it to the jury to say whether the want of a look-out is negligence in the plaintiff, and if so, whether it directly contributed to the damage done; the negligence of the plaintiff, if found, not barring his action if the defendant might have avoided the consequences of it by the exercise of due care.² If the rule referred to were applied to cases of simultaneous negligence, at the moment of disaster either party to a collision caused by their joint carelessness might be entitled to recover against the other; while, in truth, neither can recover.³

§ 16. COMPARATIVE NEGLIGENCE.

In some of the States a doctrine of 'comparative negligence' takes the place of the doctrine of contributory negli-

¹ See also *Radley v. London & Northwestern Ry. Co.*, 1 App. Cas. 754, reversing L. R. 10 Ex. 100, and restoring L. R. 9 Ex. 71, a very instructive case. See especially p. 760, Lord Penzance. It is there stated that if the defendant 'might at this stage of the matter [the actual emergency] by ordinary care have avoided all accident, any previous negligence of the plaintiffs would not preclude them from recovering.'

² *Tuff v. Warman*, 5 C. B. n. s. 573.

³ *Murphy v. Deane*, 101 Mass. 455, 464, 465. Some of the language in *Tuff v. Warman*, *supra*, is here criticised, but not so as to affect the example of the text.

gence. It has been stated from the bench as follows: Where there has been negligence in both plaintiff and defendant, still the plaintiff may recover if his negligence was slight, and that of the defendant gross in comparison. And this rule has been extended to cases in which the negligence of the plaintiff has contributed, in some degree, to the injury complained of.¹ The defendant's negligence however must stand as a cause towards the injury.² Accordingly it was laid down, of death caused at a railroad crossing, that if the deceased was guilty of negligence in not observing the precautions which an ordinarily prudent man would observe before attempting to cross the track, then the real question was, whether his negligence in that respect was slight in comparison with that of the defendants, if they were guilty of negligence at all.³

§ 17. INTERVENING FORCES.

Thus far of the contributory acts or omissions of the plaintiff. But it may be that between the wrongful act of the defendant and the damage sustained by the plaintiff there intervened an act or agency of a third person, in no way probable and not in fact anticipated,⁴ which directly produced the damage. If this be the case, and the misfortune would not have followed without it, the defendant, similarly it seems, will not be liable.⁵ For example: The defendant wrongfully sells gunpowder to the plaintiff, a boy eight years old, who takes it home and puts it into a cupboard, where it lies for more than a week, with

¹ *Chicago & Q. R. Co. v. Van Patten*, 64 Ill. 510, 517, Scott, J.

² *Id.* at p. 514.

³ *Id.* p. 517.

⁴ See *Clark v. Chambers*, 3 Q. B. Div. 327, as to damage resulting from removal by a third person of obstructions unlawfully put in the highway by the defendant, he being held liable.

⁵ *Carter v. Towne*, 103 Mass. 507; *Molloy v. New York Real Est. Assoc.*, 156 N. Y. 205; *Morris v. Brown*, 111 N. Y. 3, 8; *Fowles v. Briggs*, 116 Mich. 425; *Schwartz v. Shull*, 45 W. Va. 405.

the knowledge of the child's parents. The boy's mother now gives some of the powder to him, which he fires off with her knowledge. This is done a second time, when the child is injured by the explosion. The defendant is not liable.¹

Indeed the defendant can never be liable when anything out of the natural and usual course of events unexpectedly arises and operates in such a way as to make the defendant's negligence, otherwise harmless, productive of injury. A whirlwind does not usually arise on a quiet day, and hence, though a person should build a small fire in a country road, contrary to law, on a mild day, he would not probably be liable for the consequences of a whirlwind suddenly springing up and scattering the fire, to the damage of another.²

The case will be different if the party acted with knowledge or notice of the intervening act, agency, or force of nature. In this case he will be liable; the fact

Notice. that the person intervening is liable makes no difference in such a case.³ For example: The defendant shoots a pistol against a polished surface in a thoroughfare, at such an angle as to render it likely that the ball will glance and hit some one. It does glance and hits the plaintiff. The defendant has caused the injury and is liable.⁴ Again: The defendant throws a lighted squib into a market-house on a fair-day, which strikes the booth of A, who instinctively throws it out, when it strikes the booth of B. The latter

¹ *Carter v. Towne*, 103 Mass. 507.

² Compare *Insurance Co. v. Tweed*, 7 Wall. 44. For all that happens in the regular course of things, under the conditions as they exist at the time of the act or omission in question, the defendant will be liable, though the particular harm resulting may have been altogether improbable. See the important case of *Smith v. Southwestern Ry. Co.*, L. R. 5 C. P. 98, and 6 C. P. 14, Exch. Ch.; ante, pp. 51, 52.

³ *Gould v. Schermer*, 101 Iowa, 582; *Pratt v. Chicago R. Co.*, 107 Iowa, 287; *Buchanan v. West Jersey R. Co.*, 52 N. J. 265; *Billman v. Indianapolis R. Co.*, 76 Ind. 166; *Cleveland R. Co. v. Wynaut*, 134 Ind. 681; *McClellan v. St. Paul R. Co.*, 58 Minn. 104.

⁴ This example is fairly borne out by *Scott v. Shepherd*, 3 Wils. 403. Contrast *Stanley v. Powell*, 1891, 1 Q. B. 86.

casts it out in the same manner, and it now strikes the plaintiff in the face, injuring him. The defendant is liable.¹ Again: The defendant wrongfully sells a mischievous hair-wash to the plaintiff's husband, knowing that it is intended for the plaintiff's use, and the plaintiff is injured in using it. The defendant is liable.² Again: The defendant, a manufacturer of drugs, negligently labels a jar, put up by him, of belladonna as dandelion, the former a poisonous, the latter a harmless, drug. The jar passes from the defendant to a wholesale dealer, then to a retail dealer, and a portion of it then to the plaintiff, who buys and takes it as dandelion. The defendant is liable; the intermediate parties have only carried out, in the sale, the intention of the defendant.³

In cases however where the alleged breach of duty is directly involved in a breach of contract, the courts qualifiedly deny the liability of the defendant to any one except to the party with whom he made the contract, — a point elsewhere noticed.⁴ The authorities are not altogether consistent, but there appears to be an agreement in regard to cases of intended harm; and the general result may be stated to be, that if the defendant intended or if he can fairly be assumed to have intended the acts of the intermediate agency, as where he expects or contemplates them, — for instance by making a railway carriage, to be used by passengers of the

¹ *Scott v. Shepherd*, 3 Wils. 403.

² *George v. Skivington*, L. R. 5 Ex. 1. See *Cann v. Willson*, 39 Ch. D. 39, 43; *Langridge v. Levy*, 2 M. & W. 519; s. c. 4 M. & W. 338.

³ *Thomas v. Winchester*, 6 N. Y. 397. The reason given by the court however was that the defendant, being engaged in a very dangerous business, acted at his own peril. Compare *Farrant v. Barnes*, 11 C. B. n. s. 553, and *Brass v. Maitland*, 6 El. & B. 470. See also *Schubert v. Clark*, 5 N. W. Rep. 1103; *Davidson v. Nichols*, 11 Allen, 514; *Knelling v. Lean Manuf. Co.*, 183 N. Y. 78 (land roller); *Lewis v. Terry*, 111 Calif. 39 (folding bed); *Lechman v. Hooper*, 52 N. J. 253 (wall); *Woodword v. Miller*, 119 Ga. 618 (buggy); *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64. The cases show that the article need not be dangerous in itself; enough that the defendant knew that it was dangerous.

⁴ Post, pp. 336, 337. See L. C. Torts, 617-619.

railway company for which it is made,¹ — he will be liable, though his act was a breach of contract with another.² The fact of the existence of a duty to the person with whom he contracted is not inconsistent with the existence of another duty respecting the same thing. The duty to forbear to do intentionally a thing obviously harmful preceded the formation of the contract; and it is difficult to see how that duty, owed to all persons, could, by a contract made with one or more, be abrogated in regard to others.³

The difficulty is with cases short of intention, that is, with cases of negligence only. It has been supposed that if, by the negligence of A, a contract is broken between B and C, the injured party cannot maintain any action against A; it being declared that no duty is infringed or exists except that created by the contract. For example: The defendant, a railway company, contracts with the plaintiff's servant to carry him safely to a certain place, but negligently injures him on the way. This is no breach of duty to the plaintiff.⁴

¹ *Pennsylvania R. Co. v. Snyder*, 50 Ohio St. 342; *Harvard Law Review*, April, 1902, p. 667.

² *Knelling v. Lean Manuf. Co.*, 183 N. Y. 78; *Thomas v. Winchester*, 6 N. Y. 397; *Derry v. Flitner*, 118 Mass. 131; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Lewis v. Terry*, 111 Calif. 39; *Lechman v. Hooper*, 52 N. J. 253; *Woodward v. Miller*, 119 Ga. 618; *Langridge v. Levy*, 2 Mees. & W. 519; s. c. 4 Mees. & W. 338; also *Collis v. Selden*, *infra*, and *George v. Skivington*, L. R. 5 Ex. 1. Further see *Heaven v. Pender*, 11 Q. B. Div. 503, 514. But see *Winterbottom v. Wright*, 10 M. & W. 109, and *Longmeid v. Holliday*, 6 Ex. 761. *Winterbottom v. Wright* has recently been followed in Rhode Island. *McCaffrey v. Mossberg Manuf. Co.*, 50 Atl. Rep. 651. The actual decision in *Winterbottom v. Wright* is not necessarily in conflict with the later current of authority. See note 4, *infra*.

³ See *Meux v. Great Eastern Ry. Co.*, 1895, 2 Q. B. 387, 390; *Hardaker v. Idle District Council*, 1896, 1 Q. B. 335, 340.

⁴ *Fairmount Ry. Co. v. Stutler*, 54 Penn. St. 375; *Alton v. Midland Ry. Co.*, 19 C. B. n. s. 213. But see 1 Wms. Saund. 474; Pollock, *Torts*, 474, 2d ed. It has been pointed out that in *Winterbottom v. Wright*, 10 M. & W. 109, and *Longmeid v. Holliday*, 6 Ex. 761, generally relied upon for the rule under consideration, there was no negligence on the part of the defendant; in the one case knowledge of the defect not being

There is grave doubt however both in principle and upon authority, whether, apart from particular cases like the one just referred to, the rule itself upon which the decision is founded can be supported.¹ A railroad company or other person would not probably be liable to a master for an injury wrongfully done to a servant, without notice of the relation of master and servant.² But if there is a duty to refrain from intentional wrong, it is not easy to see why there cannot be a duty to refrain from negligence, where that is attended with notice of the contract, that is, of the rights of the plaintiff. The essential elements of legal duty are present in such a case; the rights of the plaintiff being known, danger is observed; hence the duty not to be guilty of misconduct touching such rights.

As a question of authority the old doubts are generally set at rest; there are many cases of negligence opposed to the view that the contract creates the only duty that exists in such situations.³ For example: The defendant, a railway company, contracts with the plaintiff's master, with whom the plaintiff is to travel in the defendant's coaches, to carry the plaintiff's luggage to a certain place, which the defendant, through negligence, fails to do. This is a breach of duty to the plaintiff.⁴ Again: The defendant, a railway company,

alleged, in the other not being proved. *Pollock*, 477. See also *Collis v. Selden*, L. R. 3 C. P. 495.

¹ See *Taylor v. Manchester Ry. Co.*, 1895, 1 Q. B. 134, 140; *id.* 944; *Meux v. Great Eastern Ry. Co.*, 1895, 2 Q. B. 387.

² Compare such cases as *Blake v. Lanyon*, 6 T. R. 221.

³ *Lechman v. Hooper*, 52 N. J. 253; *Lewis v. Terry*, 111 Calif. 39; *Woodward v. Miller*, 119 Ga. 618; *Derry v. Flitner*, 118 Mass. 131; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Knelling v. Lean Manuf. Co.*, 183 N. Y. 78.

⁴ *Marshall v. York & Newcastle Ry. Co.*, 11 C. B. 655; *Austin v. Great Western Ry. Co.*, L. R. 2 Q. B. 442. The first of these cases was before *Alton v. Midland Ry. Co.*, *supra*, but the second was afterwards, and in it Marshall's case was cited with approval by Blackburn, J. See also *Foulkes v. Metropolitan Ry. Co.*, 5 C. P. Div. 157; *Ames v. Union R. Co.*, 117 Mass. 541; and cases like *Henley v. Lyme Regis*, 5 Bing. 91 and 1 Bing. N. C. 222.

receives the plaintiff into one of its coaches, on a ticket bought from another railway company, with which the defendant shares the profits of traffic. The steps of the defendant's coaches are too high for persons to alight easily at the station, which is owned by the other company; and in alighting with due care the plaintiff is hurt. The defendant is liable, without regard to the question whether the plaintiff had contracted with the other company.¹

If the duty resting upon the defendant be that of common carrier of passengers, or of goods, the carrier or bailee will be liable for the damage produced by a breach of his contract, due to his own negligence, even though the negligence of a third person should contribute to the damage sustained; for the party was bound to exercise due care, and has not done so.² For example: The defendants, a railroad company, contract to carry the plaintiff to W, but on the way the train carrying the plaintiff is brought into collision with the train of another railroad company, at a crossing, through the negligence of the managers of both roads, and the plaintiff suffers injury thereby. The defendants have violated their duty to the plaintiff, and are liable for the damage sustained by him.³

The same doctrine would indeed apply to cases arising under any ordinary absolute contract for the performance of a specific duty. For example: The defendants contract to supply the plaintiffs with proper gas-pipe. Gas escapes in a certain room from a defect in the pipe provided, a third person negligently enters the room with a lighted candle, and an explosion takes place. The defendants are liable for the loss thereby caused.⁴

The rule formerly prevailed in England that a passenger in a stage or railway coach, or other vehicle, became by the

¹ *Foulkes v. Metropolitan Ry. Co.*, *supra*.

² Compare *Burrows v. March Gas Co.*, L. R. 7 Ex. 96, Exch. Ch.

³ *Eaton v. Boston & L. R. Co.*, 11 Allen, 500.

⁴ *Burrows v. March Gas Co.*, L. R. 7 Ex. 96, Exch. Ch.

act of obtaining passage 'identified' in law with the driver or manager of the vehicle. The effect of this doctrine was, that in an action by the passenger against a third person for negligence, whereby the former suffered damage in the course of the ride or journey, negligence on the part of the driver or manager of the vehicle in which the plaintiff has taken passage, contributing to the misfortune, was the negligence of the plaintiff. The plaintiff therefore was not entitled to recover, though he might himself have been free from fault.¹ This doctrine obtains in some of our courts.² For example: The defendant, owner of a stage-coach, by her driver's negligence runs over and kills the plaintiff's intestate, while he is alighting from another stage-coach; which latter coach, by the negligence of the driver, has stopped at an improper place for alighting. The latter's negligence is properly contributory, but the deceased was not personally at fault. The defendant is deemed not liable.³

The doctrine has been much criticised and often denied by other courts;⁴ and in the form above presented it was recently overruled in England.⁵ It was hard to understand how the plaintiff could be considered identified with the driver of the carriage when the driver was wholly under the control of another. The driver could not be the passenger's servant in any accurate sense in such a case; the essential feature of the relation of master and servant was wanting, to

¹ *Thorogood v. Bryan*, 8 C. B. 115; *Armstrong v. Lancashire Ry. Co.*, L. R. 10 Ex. 47; *Cleveland R. Co. v. Terry*, 8 Ohio St. 570; *Puterbaugh v. Reasor*, 9 Ohio St. 484; *Lockhart v. Lichtenthaler*, 46 Penn. St. 151; *Smith v. Smith*, 2 Pick. 621.

² See cases in note 1, *supra*. -

³ *Thorogood v. Bryan*, *supra*.

⁴ *The Milan*, Lush. 388; *Brown v. McGregor, Hay* (Scotl.), 10; *Little v. Hackett*, 116 U. S. 366; *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Coleman v. New York & N. H. R. Co.*, 20 N. Y. 492; *Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Danville Turnp. Co. v. Stewart, 2 Met. (Ky.) 119.*

⁵ *Donovan v. Laing Syndicate*, 1893, 1 Q. B. 629, 634, *Bowen, L. J.*; *The Bernina*, 12 P. Div. 58, affirmed, nom. *Mills v. Armstrong*, 13 App. Cas. 1.

wit, authority over the supposed servant.¹ And, for the same reason, the driver could not be considered as the passenger's agent. The passenger could not contract directly with the driver in the first instance, or require him to go or to stay; nor could he compel him to stop by the way, or direct him to take a particular road, or how to drive, or how to pass a coach or an obstruction.² Instead of an identification between passenger and driver, the driver himself would be liable, with the other wrongdoer, to the passenger.³

If however the passenger were himself in fault, as by participating in the negligent conduct of the driver, or by directing it in advance, it is clear that he could not recover; supposing the negligence to have contributed to the misfortune. In such a case as this, he makes the driver, *pro hac vice*, his servant, and may therefore be said to be 'identified' with him.

Upon views not unlike those in regard to the supposed 'identification' of passenger and carrier, the negligence of *Doctrine of imputability*. the parent or guardian or other person in charge of a young child, in allowing the child to fall into danger, has sometimes been deemed 'imputable' to the child, so as to affect the child with contributory negligence in all cases in which the parent or guardian would in the same situation be barred of a right of action.⁴ For example: The defendants, a railroad company, by the negligence of their servants in the course of their employment and the contribu-

¹ *Donovan v. Laing Syndicate*, 1893, 1 Q. B. 629, 634.

² Identification, in any such sense as making the driver or manager of the vehicle the servant or agent of the passenger, had been already repudiated by Pollock, B., in *Armstrong v. Lancashire R. Co.*, L. R. 10 Ex. 47, 52.

³ See the *Bernina*, *supra*.

⁴ See *Mangan v. Atterton*, L. R. 1 Ex. 239; *Clark v. Chambers*, 3 Q. B. Div. 327; *Waite v. Northeastern Ry. Co.*, El. B. & E. 719; *Hughes v. Macfie*, 2 H. & C. 744; *Wright v. Malden R. Co.*, 4 Allen, 283; *Holly v. Boston Gas Co.*, 8 Gray, 123; *Callahan v. Bean*, 9 Allen, 401; *Pittsburgh R. Co. v. Vining*, 27 Ind. 513; *Lafayette R. Co. v. Huffman*, 28 Ind. 287. The doctrine would, so far as it may be sound, be equally applicable of course to the case of any helpless or imbecile person.

tory negligence of a person in charge of the plaintiff, a child too young to take care of himself, injure the plaintiff. They are deemed not liable for the misfortune.¹

This doctrine however is not accepted by all the American courts; it has often been met by the same answer that has been given to the doctrine of imputing to passengers the negligence of their carriers. The negligence of a parent or custodian of a child, it is well said, cannot properly be imputed to the child; and, supposing the child incapable of negligence, the conclusion is reached that he can recover for injuries sustained by the negligence of another, though the negligence of the child's parent or guardian contributed to the misfortune.²

It is clear that if the child himself be guilty of contributory negligence (supposing him capable of negligence), apart from the negligence of his parent or guardian, ^{Negligence of child.} there can be no recovery; and whether the child be capable of personal negligence is a question of fact, depending upon his age and ability to take proper care of himself.³ It has sometimes been said that the same discretion is necessary in a child that is required of an adult.⁴ This however could only be true, it should seem, in those cases in which the child is sufficiently mature to be able to take good care of himself.⁵ In other cases, the better rule is that, so far as the question of the *child's* negligence is concerned, it is only necessary that he should exercise such care as he reasonably can, or as children of the same capacity generally exercise.⁶

¹ Wright *v.* Malden Ry. Co., 4 Allen, 283.

² Evansville *v.* Senhenn, 151 Ind. 42; Bellefontaine R. Co. *v.* Snyder, 18 Ohio St. 399; North Penn. R. Co. *v.* Mahoney, 57 Penn. St. 187; Louisville Canal Co. *v.* Murphy, 9 Bush, 522 (Ky.).

³ Wilmot *v.* McPadden, 61 Atl. Rep. 1069 (Conn.); Lynch *v.* Nurdin, 1 Q. B. 29; Lynch *v.* Smith, 104 Mass. 52; Evansich *v.* G. Ry. Co., 57 Texas, 126; Costello *v.* Third Avenue R. Co., 161 N. Y. 317.

⁴ Burke *v.* Broadway R. Co., 49 Barb. 529.

⁵ See Western R. Co. *v.* Rogers, 104 Ga. 224.

⁶ Lynch *v.* Smith, *supra*; Western R. Co. *v.* Rogers, *supra*; Costello *v.*

In the case of a child too young to take care of himself, it is held that, if the negligence of the parent or person in charge is the sole proximate cause of the misfortune, the defendant cannot be liable. For example: The defendant, a railway company, is negligent in moving a train along one of its tracks. The plaintiff's grandmother, who has bought of the defendant a ticket of passage for herself and the plaintiff, a child, negligently attempts to cross the track in charge of the child, and the child is injured by the train. The defendant is deemed not liable; the defendant having the right to expect that the lady would take due care of herself and of the plaintiff.¹

It is however clear that if the fault of the person in charge of the child was not a proximate cause of the misfortune, or (according to some authorities) was only part of that cause, the defendant's contract being also part of it,² the defendant, being negligent, will be liable.³ The parent or other person in charge could recover for an injury done to himself or,

Third Avenue R. Co., *supra*. It is laid down in Virginia that there is a *prima facie* presumption that a child under fourteen years of age cannot be guilty of contributory negligence. *Virginia Iron Co. v. Tomlinson*, 104 Va. 249; *Lynchburg Mills v. Stanley*, 102 Va. 590, 46 S. E. Rep. 908. And that a child of five years cannot be guilty of it. *American Tobacco Co. v. Polisco*, 104 Va. 777.

¹ *Waite v. Northeastern Ry. Co.*, El. B. & E. 719, approved in *The Bernina*, *supra*, by Lord Esher, 12 P. Div. at pp. 71-75. See 13 App. Cas. 10, 16, 19. This assumes that the defendant's negligence was not also a proximate cause of the injury, as it might be, as where the person in charge of the child, and the defendant, were driving negligently and came into collision. In Connecticut however the child (if not guilty of contributory negligence) would still be entitled to recover. *Wilmot v. McPadden*, *infra*. And that is good sense.

² *Wilmot v. McPadden*, 61 Atl. Rep. 1069, 1072 (Conn.), where the court say: 'The fact that the fault of a third party may have concurred with that of the defendant in producing the injury does not prevent the plaintiff from pursuing his remedy separately against the defendant for his tort, and it is immaterial that this concurring fault of a third party is that of an infant plaintiff's parents in negligently permitting their child to be unattended in a place of danger. *Murphy v. Derby Street Ry. Co.*, 73 Conn. 249, 252, 47 Atl. Rep. 120.'

³ *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317, 323.

if the proper relation exists, to the child,¹ by the defendant's negligence; and a fortiori should a young child, incapable of negligence, be entitled to recover in such a case. And the same would be true of negligence on the part of the child (supposing him capable of negligence) when such fault did not contribute as a proximate cause to the injury. For example: The defendant, a hackman, carelessly runs over a child five years of age, in a city, while the child is crossing a street alone, on his way home from school. The child is not guilty of any negligence further than may be implied from his going alone; in regard to this the child's parent may be negligent. The defendant is liable; the negligence of the child, if there was any in his going alone, and of the parent, if found to exist, not contributing in the stricter sense to the misfortune, since it is not the natural and usual effect of a child's crossing the street that he should be run over.²

Indeed it is not clear that the rule should not be that a child of tender years, that is to say, incapable of negligence, should be able to maintain an action for the injury he has sustained in cases of this kind, though the person in charge was guilty of contributory negligence. It might be considered enough that the defendant's act or omission was (though not the sole) a proximate cause of the damage. And the principle of the recent decisions above referred to in regard to passenger and carrier appears to sustain the view that if the negligence of each of the persons concerned is, as it might well be, a proximate cause of the injury to the plaintiff, both of them are liable.

If the parent sue for himself, upon the relation of master and servant, for loss of service, the question is somewhat different. If the child be incapable of negligence, the question will be whether the parent's Suit by parent for loss of service. negligence contributed in the stricter sense to the

¹ *Duffy v. Sable Iron Works*, 210 Penn. St. 326; *Newport News v. Scott*, 103 Va. 794.

² *Lynch v. Smith*, 104 Mass. 52.

misfortune; but if the child were capable of negligence, and were in fact negligent, it may be that negligence of his would bar an action against another by the parent, as a master, for loss of service caused, though in part only, by the defendant's negligence.¹

The result is, that whatever particular phase a case may present, be it contributory negligence or an intervening agency, the question upon which the defendant's liability turns must be whether his conduct was the (or was a) proximate cause of the damage, or only a condition thereto.

¹ *Marbury Lumber Co. v. Westbrook*, 120 Ala. 179. But compare the action for seduction, post. See also *Glassey v. Hestonville Ry. Co.*, 57 Penn. St. 172.

MALICE.

In the class of cases falling under this head malice is an element of fact, whether as a simple, primary entity or as an inference from facts suited to any of its ultimate forms, such as evil motive or recklessness. Ante, p. 25. And it is an essential element of liability.

CHAPTER IV.

SLANDER OF TITLE.

Statement of the duty. A owes to B the duty not to disparage B's property, to B's damage, by false and malicious representations.

That slander of title should be classified under the head of malice has already been pointed out. It may justly be treated as a case of an overturning of permissive right; permission to make the false statement being given by law upon condition that the permission is accepted in good faith. The permission accordingly is lost, or rather never took effect, if the false statement was made maliciously.¹

Slander of title was the name originally of an action for false and disparaging representations in regard to the plaintiff's title to land; but in recent times the action and name have been extended to false and disparaging statements in regard to property of every kind, and that too whether the statements relate to title or to quality.²

¹ *Ante*, pp. 28-30.

² *Malachy v. Soper*, 3 Bing. N. C. 371 (title to personality); *Gott v. Pulsifer*, 122 Mass. 235 (quality of personality, 'Cardiff Giant').

The name of this tort is misleading. The only real connection the subject has with slander (or libel) is in the name it bears and in the structure of the ancient declaration, which in following the declaration in slander has followed a false analogy.

§ 1. WHAT MUST BE PROVED.

The plaintiff in actions for slander of title has to prove that the statements are false, that they were made with malice, and that they have been followed by damage.¹ In regard to the falsity of the representation and damage, it will be enough to refer to what is said of the same things in the chapter on deceit; there is no difference between the two wrongs in those particulars. In regard to malice too, what is said in another place may be referred to;² but a few words should be added here.

§ 2. MALICE.

The malice which must be proved in slander of title is 'actual' malice, in the sense indeed of a state of the mind, but not necessarily in the sense of motive. Of course to prove an evil motive for the false representations will (with damage) make a *prima facie* case of 'actual' malice in the sense of the rule, and will presumptively overturn the *permission* to make the false representations, — for it must be remembered that there can be no legal right, in the higher sense, to make such representations.³ But still there is reason to believe that the effect of the evidence would be overturned by proof that the defendant

¹ *Gott v. Pulsifer*, 122 Mass. 235; *Cardon v. McConnell*, 120 N. C. 461; *Hopkins v. Drowne*, 21 R. I. 20; *Malachy v. Soper*, 3 Bing. N. C. 371; *Pater v. Baker*, 3 C. B. 831, 868; *Kendall v. Stone*, 2 Sandf. 269 (reversed on another point 5 N. Y. 14); *Stark v. Chitwood*, 5 Kans. 141; *McDanield v. Baca*, 2 Cal. 868. See *Mellin v. White*, 1894, 3 Ch. 276, C. A.

² *Ante*, pp. 25–30.

³ That the case is one of permission or privilege only, see *Gott v. Pulsifer*, 122 Mass. 235; *Hasley v. Brotherhood*, 19 Ch. D. 386; *Wren v. Weild*, L. R. 4 Q. B. 730.

believed what he said to be true and said it in good faith, however much he may also have wished to harm the plaintiff. A may make a false claim to property held by B, believing his claim to be true, and in good faith assert his intention to make good the claim, hoping at the same time to ruin B in the contest, in hatred of him.¹ At any rate it is laid down that belief and good faith on the part of the defendant will be a defence to the *prima facie* case. For example: The defendant, to the damage of the plaintiff, falsely states to a third person, with whom the plaintiff has made a contract for the sale of certain lands, that the plaintiff's title to the property will 'sooner or later be contested; ' that when the lands were sold to the plaintiff the vendor 'was not in a state of soundness or competency.' The defendant made this statement in good faith, believing it to be true. This is no breach of duty to the plaintiff.²

Further, though it is true that to prove an evil motive makes a presumptive case of the malice required, it is also true, as we have elsewhere seen,³ that the plaintiff is not bound to go so far. It is well settled that it is enough for the plaintiff to prove that the defendant made the false representations with knowledge that they were false or in reckless disregard of the consequences of making them. For example: The plaintiff in his declaration alleges that the de-

¹ See *Wren v. Weild*, L. R. 4 Q. B. 730, 734, Blackburn, J., for the court: 'Where a person claims a right in himself which he intends to enforce against a purchaser, he is entitled, and indeed in common fairness bound, to give the intended purchaser warning of such his intention. . . . And consequently we think no action can lie for giving such preliminary warning, unless either it can be shown that the threat was made *mala fide*, only with the intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful.' The qualifying words 'unless . . . purchaser' plainly imply that if there was a real purpose to follow up the claim by an action, it would not matter that the claim was also made to injure the plaintiff.

² *Pitt v. Donovan*, 1 Maule & S. 639; *Wren v. Weild*, *supra*.

³ *Ante*, pp. 25-27.

fendant made a claim falsely and maliciously and without probable cause, knowing that he had no claim, to goods of the plaintiff, to the plaintiff's damage. The declaration is good; knowledge of the baselessness of the claim would be sufficient evidence of malice.¹ Again: The defendant is sued in slander of title for publishing in a newspaper, of which he is proprietor, false and disparaging statements concerning a statue owned by the plaintiff, called the Cardiff Giant. The judge instructs the jury that the plaintiff must prove that the statements were made with a disposition wilfully and purposely to injure the value of the statue, with wanton disregard of the interest of the owner. The instruction is erroneous; the plaintiff need only prove that the statements were made with a reckless disregard of the plaintiff's rights and of the consequences to him.²

It will accordingly be noticed that what is required in the name of malice in the law of slander of title is satisfied by

Relation of fraud to malice. proof of what is called fraud, in the narrower sense, in the law of deceit, to wit, knowledge of falsity, or falsity with recklessness of consequences.³ Whether the other methods of proving fraud in deceit⁴ would satisfy the law of slander of title in regard to malice does not appear. But it is clear that fraud and malice are not synonymous terms. Fraud taken in its broad sense signifies something more than a state of mind; as we have elsewhere seen, it imports means employed, while malice as an entity, in whatever sense, is only a state of the mind.

But though the term 'fraud,' as the word is commonly

¹ *Green v. Button*, 2 Cromp. M. & R. 707; *Wren v. Weild*, L. R. 4 Q. B. 730, 734.

² *Gott v. Pulsifer*, 122 Mass. 235, Gray, C. J.: 'Malice in uttering false statements may consist either in a direct intention to injure another or in a reckless disregard of his rights and of the consequences that may result to him.' *Moore v. Stevenson*, 27 Conn. 14; *Hibbs v. Wilkinson*, 1 F. & F. 608, 610; *Paris v. Levy*, 2 F. & F. 71, 74; s. c. 9 C. B. n. s. 342, 350; *Strauss v. Francis*, 4 F. & F. 1107, 1114. See also *Scripps v. Reilly*, 35 Mich. 371.

* *Ante*, p. 88.

⁴ *Id.*

used in deceit, is here an interchangeable term with malice, and though, in regard to falsity and damage, deceit and slander of title are in accord, that is all that can be said. At that point we come to an end of slander of title, but not of deceit. Several other elements of liability would be required to make a case of deceit, which in the nature of things could not belong to the present wrong, — ignorance of the plaintiff and intention that the plaintiff should act upon the misrepresentations. Slander of title has therefore a place of its own in the law of torts.

CHAPTER V.

MALICIOUS PROSECUTION.

Statement of the duty. A owes to B the duty not to institute against him a prosecution, with malice and without reasonable and probable cause, for an offence falsely charged to have been committed by B.

That the tort called malicious prosecution is not an exceptional subject of liability in requiring proof of malice, has already been pointed out.¹ To repeat briefly what has been said before, malicious prosecution is a case of permissive right overturned; permission to bring the prosecution, without reasonable or probable cause, being given, as it is conceived, upon condition that the permission is accepted in good faith. Hence there is no permission where the prosecution was begun maliciously.

When a termination of prosecution is referred to without further explanation, such a termination is meant as will, in connection with the other elements of the action, permit an action for malicious prosecution.

The word 'prosecution' includes such civil actions as may be the subject of a suit for malicious prosecution.

The term 'probable cause' is used for brevity, in this chapter, for 'reasonable and probable cause.'²

¹ Ante, pp. 27-30.

² There may be some slight difference in meaning in special cases, between 'reasonable' and 'probable' cause. See the language of Tindal, C. J., in *Broad v. Ham*, 5 Bing. N. C. 722, 725, quoted in *Lister v. Perryman*, L. R. 4 H. L. 521, 530, 540. Ordinarily however the words are synonymous. *Stacey v. Emery*, 97 U. S. 642.

§ 1. WHAT MUST BE PROVED.

In order to maintain an action for a malicious prosecution, three things are necessary, and sometimes four, to wit, (1) the prosecution complained of must have terminated before the action for redress on account of it is begun; (2) it must have been instituted without probable cause; (3) it must have been instituted maliciously; (4) actual damage must be proved in cases in which the charge in itself would not be actionable, assuming that an action for malicious prosecution is maintainable in such a case. And it devolves upon the plaintiff to prove all these facts.

Actions for malicious prosecution are brought more commonly for wrongful criminal prosecutions. For civil suits instituted of malice and without probable cause the American law however gives a right of action, while the tendency of the English courts has gradually been against giving redress.¹ It is there given however in cases of actions involving charges of scandal to reputation or the possible loss of liberty,² such as proceedings in bankruptcy against a trader, or in petitions to wind up a company.³ The typical case indeed of a malicious prosecution is one which has defamed the person prosecuted. That accordingly will be the first subject for consideration; cases of non-defamatory prosecutions and suits will follow.

¹ The rule in England is now very clear. ‘In the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution.’ Quartz Hill Mining Co. *v.* Eyre, 11 Q. B. Div. 674, 690, Bowen, L. J. But there are some exceptions, as in cases involving false imputations touching business reputation. See *id.* p. 691.

² 11 Q. B. Div. 691, Bowen, L. J.

³ 11 Q. B. Div. 691.

§ 2. TERMINATION OF THE PROSECUTION.

The action for a malicious prosecution is given for the preferring in court of a *false* charge, maliciously and without proper grounds. And, as it cannot be known by satisfactory evidence whether the charge is true or false before the verdict and judgment of

**Reason for
requiring ter-
mination of
prosecution.**the court trying the cause, it is deemed necessary for the defendant to await the termination of the proceeding before instituting an action for malicious prosecution.¹ Or, as the reason has more commonly been stated, if the suit for the alleged malicious prosecution should be permitted before the prosecution itself is terminated, inconsistent judgments might be rendered,—a judgment in favor of the plaintiff in the action for the prosecution, and a judgment against him in that prosecution;² and it is often said that judgment against the party prosecuted, would show, and that conclusively, that there was probable cause for the prosecution.³

It will be seen in the next section (relating to probable cause) that this is an unsound view of the effect of the judgment.⁴ But since conviction would show that the charge was not false, the prosecution could not have been wrongful; the person prosecuted has now to prove that he was not guilty,⁵—conviction shows that he was guilty.

Conviction is fatal even though the prosecution take place

¹ As to what constitutes a termination see among the many cases *Graves v. Scott*, 104 Va. 372, overruling *Ward v. Reasor*, 98 Va. 399.

² *Fisher v. Bristow*, 1 Doug. 215.

³ *Parker v. Farley*, 10 CUSH. 279, 282; *Dennehey v. Woodsum*, 100 Mass. 195, 197; *Morrow v. Wheeler & W. Manuf. Co.*, 165 Mass. 349; *Castrique v. Behrens*, 3 El. & E. 709. See *Besébé v. Matthews*, L. R. 2 C. P. 684; 1 Smith's Leading Cases, 258, 6th ed.

⁴ It is held in England, on sound principle, that an action for malicious prosecution against the present plaintiff, by proceedings against him in bankruptcy, may be maintained notwithstanding an adjudication against him, if this has been set aside. *Metropolitan Bank v. Pooley*, 10 App. Cas. 210. See also *Philpot v. Lucas*, 101 Iowa, 478, 480, 481.

⁵ Precedents in Chitty, Pleading.

in a proceeding from which there is no appeal. Conviction in such a case is equally fatal with a conviction in a tribunal from the judgment of which the defendant has a right of appeal; since to allow the action for malicious prosecution would be (so it is deemed) virtually to grant an appeal. For example: The defendant procures the plaintiff to be arrested (falsely, maliciously, and without probable cause, as the latter alleges) and tried before a justice of the peace on a criminal complaint of assault and battery. The plaintiff (then defendant) is convicted, and no appeal is allowed by law. The defendant is not liable to an action for malicious prosecution.¹

It is often said that the plaintiff must have been acquitted of the charge preferred, to enable him to sue for malicious prosecution. But this is not always true; it is not true of civil suits,² and of course it is not true of criminal proceedings in which there is no power of conviction or acquittal. And it should seem clear that acquittal can have no bearing upon a case which was never, in law, begun. A suit must have been begun as a condition precedent to any action for malicious prosecution.³

It is not necessary to the termination of a civil suit, such as will permit an action for malicious prosecution, that the

¹ *Besébé v. Matthews*, L. R. 2 C. P. 684.

² *Driggs v. Burton*, 44 Vt. 124, 143.

The term 'acquittal' is often loosely used, as in *Sayles v. Briggs*, 4 Met. 421, and in *Vanderbilt v. Mathis*, 5 Duer, 304, where there has been no more than a termination of preliminary proceedings with a discharge of the prisoner. In such cases no *acquittal* is necessary, as will be seen later; none is possible in such proceedings. When an acquittal in a prosecution for crime is really necessary, there must be such a termination of the prosecution, in favor of the accused, as will enable him to plead the judgment in bar of another prosecution, as for instance by the plea of once in jeopardy.

³ As to when a suit is begun see *Cooper v. Armour*, 42 Fed. Rep. 215; *Bartlett v. Christhilf*, 69 Md. 219; *Maskell v. Barker*, 99 Calif. 642; *Coffey v. Myers*, 84 Ind. 105. Irregularity of the proceedings is of course a different thing, or may be. *Infra*, § 7.

suit should have gone to actual judgment, or even to a verdict by the jury. A civil suit is entirely within the control of the plaintiff, and he may withdraw and terminate it at any stage; and, should he take such a step, the suit is terminated. For example: The defendant (in the suit for malicious prosecution) writes in the docket book, opposite the entry of the case against the plaintiff, 'Suit withdrawn.' This is a sufficient termination of the cause for the purposes of the now plaintiff.¹

It is not necessary indeed that the party should make a formal entry of the withdrawal or dismissal of the suit, in order (without a judgment or verdict) to terminate it sufficiently for the purposes of an action by the opposite party. Any act, or omission to act, which is tantamount to a discontinuance of the proceeding has the same effect.² For example: The defendant, having procured the arrest of the plaintiff in a civil cause, fails to enter and prosecute his suit. This is a termination of the proceeding.³

If however the (civil) prosecution went to judgment, the judgment must have been rendered in favor of the defendant therein, in order to enable him to sue for malicious prosecution. Judgment against the defendant would conclusively establish the plaintiff's right of action;⁴ it could not therefore be treated as a false prosecution⁵ though it might have been attended with malice, — unless indeed it was concocted in fraud.⁶

In a criminal trial the situation is indeed different. Such a proceeding is instituted by the public, and, when by indictment, is under the control of the attorney-general or other

¹ *Arundell v. White*, 14 East, 216.

² *Cardival v. Smith*, 109 Mass. 158; *Strehlow v. Pettit*, 96 Wis. 22.

³ *Cardival v. Smith*, *supra*. ⁴ *O'Brien v. Barry*, 106 Mass. 300, 304.

⁵ *Id.* Or, as the case is sometimes put, judgment for the plaintiff would show that he had probable cause for the prosecution, a point to be considered hereafter.

⁶ *Burt v. Place*, 4 Wend. 591; *Payson v. Caswell*, 22 Maine, 212.

prosecuting officer; it is never under the control of the prosecutor. He has no authority over it; and, this being the case, he cannot, in principle, be bound by the action of the prosecuting officer. Should such officer therefore enter a dismissal of the suit before the defendant, having been duly indicted, has been put in jeopardy, this act, it seems, gives no right to the prisoner against the prosecutor. The course of proceeding was not arrested by the prosecutor, and he has a right to insist that the law shall take its regular course, and place the prisoner in jeopardy, before he shall have the power to seek redress. Such is the view taken, not perhaps generally, but at any rate by some of the courts. For example: The defendant procures the plaintiff to be indicted for arson. The prosecuting officer, failing to obtain evidence, enters a 'nolle prosequi' before the jury is sworn. The prosecution is not terminated in favor of the prisoner.¹

Criminal trials distinguished.

¹ *Bacon v. Towne*, 4 *Cush.* 217. It has sometimes been said that the accused cannot sue in any case in which a 'nolle prosequi' has been entered, — that he must show a verdict. *Parker v. Farley*, 10 *Cush.* 279; *Brown v. Lakeman*, 12 *Cush.* 482; *Cardival v. Smith*, 109 *Mass.* 158. But that doctrine has been overturned in the State in which it was laid down. *Graves v. Dawson*, 130 *Mass.* 78; s. c. 133 *Mass.* 419; *Douglas v. Allen*, 56 *Ohio St.* 156, 158; *Murphy v. Moore*, 11 *Atl. Rep.* 665. See also *Driggs v. Burton*, 44 *Vt.* 124, 143. Further as to 'nolle prosequi' see *Commonwealth v. Tuck*, 20 *Pick.* 356, 365; *Langford v. Boston R. Co.*, 144 *Mass.* 431; *Welch v. Cheek*, 125 *N. C.* 353; s. c. 115 *N. C.* 310. If an order of nolle prosequi is entered after the trial jury is impanelled, in violation of the prisoner's right, as where he has demanded a verdict, he is acquitted in law; and such an acquittal is as good for the purpose of the suit for malicious prosecution as a verdict of acquittal. Further, the order of nolle prosequi may be a merely formal thing, and so immaterial to the question of the suit by the prisoner, as in *Graves v. Dawson*, *supra*. Or it may have been procured by the accused, or with his consent, or by compromise, which clearly would bar the action. *Graves v. Dawson*; *Driggs v. Burton*, 44 *Vt.* 124; *Woodworth v. Mills*, 61 *Wis.* 44.

Termination by nolle prosequi is considered sufficient in not a few cases, but these cases are not perhaps inconsistent with *Graves v. Dawson*. See *Douglas v. Allen*, 56 *Ohio St.* 156; *Woodman v. Prescott*, 66 *N. H.* 375; *Marcus v. Bernstein*, 117 *N. Car.* 31; *Stanton v. Hart*, 27 *Mich.* 539.

If however the prosecution was arrested by the grand jury's finding no indictment upon the evidence, and the consequent ~~No indictment found.~~ discharge of the prisoner, this is an end of the prosecution, such as will enable him (other elements present) to bring the action under consideration.¹ And the same is true when the prosecution is begun by complaint before a magistrate who has jurisdiction only to bind over or discharge the prisoner. The magistrate's entry that the prisoner is discharged entitles him, so far, to bring an action.² And this is true, though the prosecutor withdraw his prosecution.³ In preliminary proceedings such as the foregoing there can be no conviction or acquittal. For example: The defendant prefers against the plaintiff a charge of forgery before a justice of the peace, who has authority only to bind over or discharge the prisoner. The justice's minutes contain the following entry: 'After full hearing in the case, the complainant withdrew his prosecution, and it was thereupon ordered' that the plaintiff be discharged. An action for malicious prosecution is now proper.⁴

In none of the foregoing classes of cases has there been an acquittal of the party prosecuted, or anything tantamount ~~What consti-
tutes acquit-
tal.~~ in law to an acquittal. To be acquitted in a prosecution for crime (the only case calling for

remark), the accused must have been put in jeopardy; but a state of jeopardy is not reached until the swearing of the petit jury. Hence if acquittal were necessary, an action for malicious prosecution could not be instituted upon the failure of the grand jury to find an indictment, or upon the discharge of a magistrate who has no power to convict. In neither case has the prisoner been in jeopardy. The fact appears to be that, notwithstanding the language

¹ See *Byne v. Moore*, 5 *Taunt.* 187; *s. c. L. C. Torts*, 181.

² *Shattuck v. Simonds*, 191 Mass. 506; *Rider v. Kite*, 61 N. J. 8. But see *Ward v. Reasor*, 98 Va. 399, 36 *S. E. Rep.* 470 (Va.), which clearly is wrong, and is overruled by *Graves v. Scott*, 104 Va. 372. Acquittal is required only where there can be an acquittal.

³ *Sayles v. Briggs*, 4 *Met.* 421.

⁴ *Id.*

of some of the judges, a termination of the proceedings with an acquittal, actual or virtual, is necessary only in case of an indictment or information against the prisoner. In other cases, it is enough that the prosecution has been dismissed.¹

By way of summary, the various rules of law may be thus stated: A civil suit is sufficiently terminated (1) when the plaintiff has withdrawn, or otherwise discontinued, his action; or (2) when judgment has been rendered in favor of the defendant. A criminal suit is sufficiently terminated (1) when the prosecution, if brought before a magistrate, has been dismissed, or (2) when, if preferred before the grand jury, that body has found no indictment; or (3) when, an indictment having been found, and the prisoner having been put in jeopardy, the prisoner has been acquitted in fact or in law. It seems however that the termination must not have been brought about by the defendant in the former prosecution, as by a compromise or by his request.² Perhaps the prisoner should also have been discharged; but he is entitled to a discharge in all the cases mentioned.

Summing up
of termina-
tion.

§ 3. WANT OF PROBABLE CAUSE.

Supposing the plaintiff to have begun his action after the termination of the prosecution, it then devolves upon him

¹ The rule requiring an acquittal of the party prosecuted runs back to an early English statute entitled 'Malicious Appeals.' Westm. 2, c. 12 (13 Edw. 1). By this statute it was ordained that when any person maliciously 'appealed [that is, accused and prosecuted] of felony surmised upon him, doth *acquit* himself in the King's Court in due manner,' &c., the appellor shall be imprisoned and be liable in damages to the injured party. A few years later statutes were passed against conspiracies to indict persons maliciously. L. C. Torts, 190. Between these statutes and the statute first mentioned, and taking its shape from them, the action for malicious prosecution arose. The various statutes applied to cases of prosecutions for felony alone; in such cases it was provided that acquittal was necessary. L. C. Torts, 192.

² Welch *v.* Cheek, 125 N. Car. 353; s. c. 115 N. Car. 310; Langford *v.* Boston R. Co., 144 Mass. 431; cases of *nolle prosequi*. See also Marcus *v.* Bernstein, 117 N. Car. 31.

further to establish the defendant's breach of duty by showing that he instituted the prosecution, or perhaps only continued it,¹ without probable cause.² And this appears to mean that he ought to show that no such state of facts or circumstances was known to him as would induce one of ordinary intelligence and caution to believe the charge preferred to be true.³ Or, conversely, probable cause for preferring a charge of crime is shown by facts, actual or believed by him to be actual, which would create a reasonable belief of the guilt of the plaintiff.⁴

To act therefore on very slight circumstances of suspicion, such as a man of caution would deem of little weight, is to act without probable cause. For example: The defendant procures the arrest of the plaintiff upon a charge of being implicated in the commission of a robbery, which in fact has been committed by a third person alone, who absconds. The

¹ *Christian v. Hanna*, 58 Mo. App. 37.

² *Turner v. Ambler*, 10 Q. B. 252. Under the early law, as declared by the Statute of Malicious Appeals (*ante*, p. 24, note) and applied for centuries, this apparently was not true. Acquittal and malice made a presumptive case. Probable cause was a defence, but so far as it was distinguished from malice the burden of proof in regard to it seems to have been upon the defendant. See *Savill v. Roberts*, Ld. Raym. 374. It appears to have been considered as overturning the plaintiff's evidence of malice. After *Savill v. Roberts* (1699) the defendant had no need to prove probable cause if an indictment not involving scandal or loss of life or liberty had been found against the plaintiff; the plaintiff being 'constrained to show express malice and iniquity in the prosecution.' *Savill v. Roberts*, Lord Holt. This would be done evidently by proving want of probable cause. The action for malicious prosecution was 'not to be favored but managed with great caution,' in cases not involving scandal or loss of life or liberty. *Id.* This doctrine led the way for the modern rule requiring the plaintiff to prove want of probable cause in all cases.

³ *Shattuck v. Simonds*, 191 Mass. 506; *Ellis v. Simonds*, 168 Mass. 316; *Driggs v. Burton*, 44 Vt. 124; *Boyd v. Cross*, 35 Md. 194; *Joiner v. Ocean Steamship Co.*, 86 Ga. 238; *Hazard v. Flury*, 120 N. Y. 228; *Humphries v. Parker*, 52 Maine, 502.

⁴ *Broughton v. Jackson*, 18 Q. B. 378; *Panton v. Williams*, 2 Q. B. 169, Ex. Ch.; *Ellis v. Simonds*, 168 Mass. 316; *Boyd v. Cross*, *supra*; *Ramsey v. Arrott*, 64 Texas, 320; *Davis v. Pacific Telephone Co.*, 127 Calif. 312; *Torsch v. Dell*, 88 Md. 459; *Burt v. Smith*, 181 N. Y. 1.

plaintiff, who has been a fellow-workman with the criminal, has been heard to say that he (the plaintiff) had been told, a few hours before the robbery, that the robber had absconded, and that he had told the plaintiff that he intended to go to Australia. The robber has also been seen, early in the morning after the robbery, coming from a public entry leading to the back door of the plaintiff's house. The defendant has no probable cause for the arrest.¹

Probable cause however does not depend upon the actual state of the case, in point of fact, but upon honest and reasonable belief.² Hence, though the prosecutor be in ^{Acting in bad} faith. a situation to show that he had probable cause, so far as regards the strength of his information, still if he did not believe the facts and rely upon them in procuring the arrest, he has committed a breach of duty towards the person arrested. For example: The defendant goes before a magistrate and prefers against the plaintiff the charge of larceny, for which there was reasonable ground in the facts within the defendant's cognizance. The defendant however does not believe the plaintiff guilty, but prefers the charge in order to coerce the plaintiff to pay a debt which he owes to the defendant. The defendant has acted without probable cause.³

The question of probable cause is to be decided by the circumstances existing or supposed to exist at the time of the arrest, and not by the turn of subsequent events;⁴ such at all

¹ *Busst v. Gibbons*, 30 Law J. Ex. 75. *Comp. Lister v. Perryman*, L. R. 4 H. L. 521, as to hearsay.

² *Lytton v. Baird*, 95 Ind. 349; *Hazard v. Flury*, 120 N. Y. 223; *Philpot v. Lucas*, 101 Iowa, 478; *Goldstein v. Foulkes*, 19 R. I. 291; *King v. Colvin*, 11 R. I. 582.

³ *Broad v. Ham*, 5 Bing. N. C. 722; *Turner v. Ambler* 10 Q. B. 252; *Krulevitz v. Eastern R. Co.*, 143 Mass. 228; *Ball v. Rawles*, 93 Calif. 222; *Luneford v. Dietrich*, 93 Ala. 565.

⁴ *Thompson v. Beacon Rubber Co.*, 56 Conn. 493; *Swain v. Stafford*, 4 Ired. 392 and 398; *Delegal v. Highley*, 3 Bing. N. C. 950. But see *Adams v. Lisber*, 3 Blackf. 241; *Hickman v. Griffin*, 6 Mo. 37. See L. C. Torts, 198-200.

events is the general rule. If the defendant had at that time, in the facts known to him or in the information received,¹

Time of probable cause: such grounds for supposing the plaintiff guilty of the crime charged as would satisfy a cautious man, he violates no duty to the plaintiff in procuring his arrest, though such grounds be immediately and satisfactorily explained away, or the truth discovered by the prosecutor himself. For example: The defendant procures the plaintiff to be arrested for the larceny of certain ribbons, on reasonable grounds of suspicion. He afterwards finds the ribbons in his own possession. He is not liable.²

On the other hand, in accordance with the same principle, if the prosecutor was not possessed of facts justifying a belief that the accused was guilty of the charge, it matters not that subsequent events (short of a judgment of conviction, as to which presently) show that there existed, in fact, though not to the prosecutor's knowledge, circumstances sufficient to have justified an arrest by any one cognizant of them. He has violated his duty in procuring the arrest. For example: The defendant to an action for malicious prosecution shows facts sufficient to constitute probable cause, but does not show that he was cognizant of such facts when he procured the plaintiff's arrest. The defence is not good.³

It has however been declared that, while acquittal is no evidence of probable cause, conviction is conclusive of its existence;⁴ and this though the verdict is afterward set aside

¹ It is not necessary that the facts should be within the personal knowledge of the prosecutor. *Galloway v. Burr*, 32 Mich. 332; *Lamb v. Galland*, 44 Calif. 609; *Smith v. Munch*, 65 Minn. 256.

² *Swain v. Stafford*, 4 Ired. 392 and 398.

³ *Delegal v. Highley*, 3 Bing. N. C. 950.

⁴ *Whitney v. Peckham*, 15 Mass. 243 (by a trial magistrate); *Parker v. Farley*, 10 Cush. 279, 282; *Morrow v. Wheeler & Wilson Co.*, 165 Mass. 349; *Dennehey v. Woodsum*, 100 Mass. 195, 197; *Holliday v. Holliday*, 123 Calif. 26, 32; *Sharpe v. Johnston*, 76 Mo. 660; *Phillips v. Kalamazoo*, 53 Mich. 33; *Payson v. Caswell*, 22 Maine, 212; *Adams*

and, upon a new trial, an acquittal follows.¹ But this, it will be seen, is inconsistent with the rule that the question of probable cause is to be determined by the state of facts within the prosecutor's knowledge (supposing him to have acted bona fide upon such facts) at the time of the arrest.. Conviction does not, in point of fact, prove that the prosecutor at the time had reasonable grounds to suspect the guilt of the prisoner; such grounds, that is, as would have induced a cautious man to arrest the suspected person.²

' The presence or absence of probable cause does not depend upon the guilt or innocence of the accused.³ The issues are essentially different.⁴ It is perhaps pertinent to notice that the old Statute of Malicious Appeals, which in reality lies at the foundation of the law concerning criminal prosecutions, by plain implication exempted the prosecutor (of felony) from liability in case of the conviction of the prisoner;⁵ that shows

v. Bicknell, 126 Ind. 210; *Crescent Live Stock Co. v. Butchers' Union*, 120 U. S. 141; *Hartshorn v. Smith*, 104 Ga. 235; *Short v. Spragins*, id. 628; *Griffis v. Sellars*, 2 Dev. & B. 492. See ante, p. 206. Contra, *MacDonald v. Schroeder*, 214 Penn. St. 411, where conviction is reversed; *Richter v. Koster*, 45 Ind. 440 (the same); *Davis v. McMillan*, 142 Mich. 391, 395; *Burt v. Place*, 4 Wend. 591; *Metropolitan Bank v. Pooley*, 10 App. Cas. 210, ante, p. 206, note.

¹ *Whitney v. Peckham*, *supra*; *Holliday v. Holliday*, *supra*; *Hartshorn v. Smith*, *supra*; *Payson v. Caswell*, *supra*; *Adams v. Bicknell*, *supra*. Contra, and better, *MacDonald v. Schroeder*, 214 Penn. St. 411 (conviction only *prima facie* evidence of want of probable cause). Contra everywhere of simple *acquittal*. *Thompson v. Beacon Rubber Co.*, 56 Conn. 493; *Bitting v. Ten Eyck*, 82 Ind. 421; *Heldt v. Webster*, 60 Texas, 207; *Eastman v. Monastes*, 32 Oregon, 291; *Apgar v. Woolston*, 43 N. J. 60; *Philpot v. Lucas*, 101 Iowa, 478.

² *Thompson v. Beacon Rubber Co.*, 56 Conn. 493; *Philpot v. Lucas*, 101 Iowa, 478, 480, 481.

³ *Lytton v. Baird*, 95 Ind. 349, 352.

⁴ *Id.*

⁵ *Hess v. Oregon Co.*, 31 Oregon, 503. See *Eastman v. Monastes*, 32 Oregon, 291, 295, and cases cited; ante, p. 212, note. If the forgotten statute had been strictly followed, this (which is now true generally) would be true only in cases of conviction of what was felony at common law. In other cases the conviction could not, by the old statute, bar an action. Nor, by modern law, could conviction bar an action for malicious prosecution on grounds of estoppel, because the parties to the two

the true effect of conviction — probable cause is another thing.

There are other seeming anomalies relating to this phase of probable cause; one of them is found in the effect accorded by some courts to the action of the grand jury, or to that of a magistrate who has power only to bind over the accused for trial. That action is said to furnish *prima facie* evidence in regard to probable cause, in a suit for malicious prosecution.¹ For example: The now defendant prosecutes the now plaintiff before the grand jury, on a charge of larceny, and the grand jury throws out the bill. This is deemed *prima facie* evidence of want of probable cause in the present suit.² Again: A magistrate binds over a person accused of crime, who is afterwards tried and acquitted. This is deemed *prima facie* evidence of probable cause in an action against the prosecutor for malicious prosecution.³

Other courts have taken a different view of the matter, denying that the action of the grand jury or of the magistrate actions are different; the criminal suit being between the State and the prisoner. The judgment could not, properly taken, be more than *prima facie* evidence of probable cause, even if, of itself alone, it could be considered as amounting to any evidence on that point. The question before the petit jury, as has elsewhere been observed (*post*, p. 218, note), is, not whether there was probable cause for the arrest, within the knowledge of the prosecutor, but whether the prisoner is guilty. However, the language of many of the decisions is that the conviction is conclusive of probable cause; and the author at one time considered this to be correct. L. C. Torts, 196, 197. See *ante*, p. 206.

¹ *Hidy v. Murray*, 101 Iowa, 65; *Philpot v. Lucas*, id. 478, 481; *Peck v. Chouteau*, 91 Mo. 138; *Frost v. Holland*, 75 Maine, 108; *Rankin v. Crane*, 104 Mich. 6; *Bigelow v. Sickles*, 80 Wis. 98; *Bostick v. Rutherford*, 4 Hawks, 83; *William v. Norwood*, 2 Yerg. 329; *Ricard v. Central Pacific R. Co.*, 15 Nev. 167. But it is considered otherwise if the prosecutor believed that the indictment had been improperly procured. *Peck v. Chouteau*, *supra*; *Sharpe v. Johnston*, 76 Mo. 660.

² See *Nicholson v. Coghill*, 6 Dowl. & R. 12, 14, *Holroyd, J.*; *Broad v. Ham*, 5 Bing. N. C. 722, 727, *Coltman, J.*

³ *Bacon v. Towne*, 4 Cush. 217; *Graham v. Noble*, 13 Serg. & R. 270; *Burt v. Place*, 4 Wend. 591. See *Reynolds v. Kennedy*, 1 Wils. 232; *Sutton v. Johnstone*, 1 T. R. 493, 505, 506.

is evidence on the question of probable cause, in the action for malicious prosecution.¹ How can it be, they say in effect, that what is no evidence at all before the grand jury or the magistrate in the same case can be *prima facie* evidence before a petit jury in a different case?² To this reasoning it might be added that the grand jury or the magistrate does not consider what prompted the prosecutor, but whether there is now sufficient evidence to justify holding the accused further for trial. But the contrary doctrine, after all, is only a doubtful application of the rule of the relevancy of a later fact to prove an earlier. To refuse to indict, on the other hand, is not evidence of want of probable cause.³

Further, it has been seen⁴ that in this country an action for a malicious civil suit may be brought. Now while it is held that the mere omission to appear and prosecute an action, whereby the defendant obtains a judgment of nonsuit, is no evidence of want of probable cause,⁵ it has been said in England that a voluntary discontinuance, being a positive act, may show *prima facie* evidence of the same.⁶ But the contrary has been laid down in this country, and in the absence of other facts tending to show want of probable cause is, it seems, the better rule.⁷ And still more clearly is a dismissal for want of prosecution no evidence on the point.⁸

¹ *Noble v. White*, 103 Iowa, 352, 360; *Davis v. McMillan*, 142 Mich. 391; *Apgar v. Woolston*, 43 N. J. 61.

² See *Farwell v. Laird*, 58 Kans. 402; *Sweeney v. Perney*, 40 Kans. 102; *Israel v. Brooks*, 23 Ill. 575. As touching upon the question it may be noticed that a magistrate's action in regard to probable cause has no bearing on an officer's justification of probable cause, in a suit for false imprisonment.

³ *Brady v. Stiltner*, 40 W. Va. 289; *Taylor v. Dominick*, 36 S. Car. 368.

⁴ *Ante*, p. 205.

⁵ *Sinclair v. Eldred*, 4 *Taunt*, 9; *Webb v. Hill*, 3 *Car. & P.* 485.

⁶ *Nicholson v. Coghill*, 6 *Dowl. & R.* 12; *Webb v. Hill*, 3 *Car. & P.* 485.

⁷ *Flickinger v. Wagner*, 46 Md. 580; *Joiner v. Ocean Steamship Co.*, 86 Ga. 238; *Boeger v. Langenberg*, 97 Mo. 390.

⁸ *Walkley v. Johnson*, 115 Mich. 285.

It is clear that the mere abandonment of the prosecution by the prosecutor, and the acquittal of the prisoner, are no evidence of a want of probable cause.¹ Such facts in themselves show nothing except that the prosecution has failed. It may still have been undertaken upon reasonable grounds of suspicion.² Still, the circumstances of the abandonment may be such as to indicate *prima facie* a want of probable cause. For example: The defendant presents two bills for perjury against the plaintiff, but does not himself appear before the grand jury, and the bills are ignored. He presents a third bill, and, on his own testimony, the grand jury return a true bill. The defendant now keeps the prosecution suspended for three years, when the plaintiff, taking down the record for trial, is acquitted; the defendant declining to appear as a witness, though in court at the time and called upon to testify. These facts indicate the absence of probable cause.³

If the prosecutor takes the advice of a practising lawyer upon the question whether the facts within his knowledge⁴ are such as to justify a complaint, assuming that he has fully, fairly, and honestly stated such facts,⁵ and acts bona fide upon the advice given, he will be protected, on the footing of probable cause, or perhaps absence of malice,⁶ even though the counsel gave erroneous

¹ *Williams v. Taylor*, 6 Bing. 183; *Vanderbilt v. Mathias*, 5 Duer, 304; Cases, 58; *Johnson v. Chambers*, 10 Ired. 287.

² The magistrate or grand jury decides whether there is reasonable ground for putting the prisoner upon trial; the petit jury decides whether the prisoner is guilty.

³ *Williams v. Taylor*, 6 Bing. 183. To set the criminal law in motion to compel payment of a debt is *prima facie* evidence of want of probable cause and malice. *MacDonald v. Schroeder*, 214 Penn. St. 411.

⁴ *Holliday v. Holliday*, 123 Calif. 26; *Parker v. Parker*, 102 Iowa, 500; *Black v. Buckingham*, 174 Mass. 102, 107 ('within his knowledge and belief').

⁵ *Jones v. Morris*, 97 Va. 43; *O'Neal v. McKinna*, 116 Ala. 606.

⁶ Some cases put it on the latter footing. *Murphy v. Larson*, 77 Ill. 172; *Sharpe v. Johnson*, 76 Mo. 660; *Hazzard v. Flury*, 120 N. Y. 223.

advice.¹ That is, he will be protected, though he might not have been in possession of facts such as would have justified a prosecution without the advice. For example: The defendant states to his attorney the facts in his possession concerning a crime supposed to have been committed by the plaintiff. The attorney advises the defendant that he can safely procure the plaintiff's arrest. The defendant is not liable, though the facts presented did not in law constitute probable cause.²

The prosecutor must however, as the proposition itself states, act bona fide upon the advice given, if he rest his defence upon such a ground alone otherwise he will be liable.³ For example: The defendant procures the arrest of the plaintiff, having first taken the advice of legal counsel upon the facts. This advice is erroneous, and it is not acted upon in good faith believing it to be correct; the arrest being procured for the indirect and sinister purpose of compelling the plaintiff to sanction the issuance of certain illegal bonds. The defendant is liable.⁴

If, after taking legal advice and before the arrest, new facts come to the knowledge of the prosecutor, he cannot justify the arrest as made on advice, unless such new facts are consistent with the advice which has been given. If they should be of a contrary nature, casting new doubt upon the

¹ *Terre Haute R. Co. v. Mason*, 148 Ind. 578; *O'Neal v. McKenna*, 116 Ala. 606; *Williams v. Casebeer*, 126 Calif. 77; *Holliday v. Holliday*, 123 Calif. 26; *Hicks v. Brantley*, 102 Ga. 264; *Cooper v. Utterbach*, 37 Md. 282; *Powlowski v. Jenks*, 115 Mich. 275; *Black v. Buckingham*, 174 Mass. 102, 107; *Olmstead v. Partridge*, 16 Gray, 381; *Jordan v. Alabama R. Co.*, 81 Ala. 220; *Baker v. Hornick*, 57 S. Car. 218; *Cole v. Curtis*, 16 Minn. 182; *Hess v. Oregon Co.*, 31 Oregon, 503; *Ravenga v. Mackintosh*, 2 B. & C. 693; *Snow v. Allen*, 1 Stark. 502. But as to erroneous advice on the *law* (*ignorantia legis*, etc.) see *Hazard v. Flury*, 120 N. Y. 223, which seems to be wrong.

² *Snow v. Allen*, *supra*.

³ *O'Neal v. McKenna*, *supra*; *Ravenga v. Mackintosh*, 2 B. & C. 693. Whether the advice given was given in good faith is immaterial. *Sandell v. Sherman*, 107 Calif. 397; *Seabridge v. McAdam*, 119 Cal. 460.

⁴ *Ravenga v. Mackintosh*, *supra*. See *Hewlett v. Cruchley*, 5 *Taunt*, 277, 283.

party's guilt, the prosecutor cannot safely proceed to procure an arrest except upon new advice; unless indeed the entire chain of facts in his possession shall satisfy the court that there existed a reasonable ground for his action. To make use of the advice given, when the new facts indicate that the accused is not guilty, would not be to act upon the advice in good faith.¹

Again, if the only defence be that the prosecutor acted upon legal advice, a breach of duty may still be made out if it appear that the prosecutor untruly stated to the counsel the facts within his knowledge. The plaintiff's case, so far as it rested on the proof of want of probable cause, would be established by showing that the actual facts known to the prosecutor (differing from those on which the advice was obtained) showed that he had no reasonable ground for instituting the prosecution.

The result is, that the defence of advice of legal counsel, to establish probable cause, must not be resorted to as a mere cover for the prosecution, but must be the result of an honest and fair purpose; and the statement made at the time by the prosecutor to his counsel must be full and true, and consistent with that purpose.²

This defence of having acted upon legal advice is, it seems, a strict one, confined to the case of advice obtained from lawyers admitted to practise in the courts.³ Such persons are certified to be competent to give legal advice, and their advice when properly obtained and acted upon is conclusive of the existence of probable cause. But if the prose-

¹ See *Fitzjohn v. Mackinder*, 9 C. B. N. S. 505, 531, Ex. Ch., Cockburn, C. J.; *Cole v. Curtis*, 16 Minn. 182.

² *Walter v. Sample*, 25 Penn. St. 275.

³ It is held in *Cole v. Andrews*, 74 Minn. 93, that the relation of attorney and client must exist between the person asking and the person receiving the advice to make the case one of probable cause; which is contra to *Hess v. Oregon Co.*, 31 Oregon, 503, to *Wenger v. Phillips*, 195 Penn. St. 214, and to *Oliver v. Pate*, 43 Ind. 132. The last named case is denied in *Cole v. Andrews*. The cases cited are cases of advice given by a prosecuting officer. See also *Williams v. Casebeer*, 126 Calif. 77, advice by a police judge.

cutor act upon the advice of a person not a lawyer, and therefore not declared competent to give legal advice, the facts must be shown upon which the advice was obtained, however honestly and properly it was sought and acted upon. It is not enough, by the better view, that the advice was given by an officer of the law, professing familiarity with its principles, if such a person were not a lawyer. For example: The defendant procures the arrest of the plaintiff upon advice of a justice of the peace, with whom he has been in the habit of advising on legal matters; but the justice is not a lawyer. This is not evidence of probable cause.¹

The want of probable cause is not to be inferred *because* of mere evidence of malice, since a person may maliciously prosecute another against whom he has the strongest evidence; whom indeed he may have caught in the commission of the crime.² There must be some evidence indicating that the prosecutor instituted the suit under circumstances which would not have induced a cautious man to act.

Malice does
not show
probable
cause.

It should be observed finally that it may be necessary for the plaintiff, even in a jury case, to convince the *judge* of the want of probable cause upon the facts proved. Action of the judge. The facts material to the question of probable cause must be found by the jury; but the judge may have to decide whether the facts so found establish probable cause or want of it. That is a question of law.³

¹ *Beal v. Robeson*, 8 Ired. 276. But see *Williams v. Casebeer*, 126 Calif. 77.

² *Turner v. Ambler*, 10 Q. B. 252, 257; *Boyd v. Cross*, 35 Md. 194.

³ *Panton v. Williams*, 2 Q. B. 169, Ex. Ch.; *Lister v. Perryman*, L. R. 4 H. L. 521; *Abrath v. Northeastern Ry. Co.*, 11 App. Cas. 247; *Dietz v. Langfitt*, 63 Penn. St. 234; *Driggs v. Burton*, 44 Vt. 124; *Boyd v. Cross*, *supra*; *Drumm v. Cessnum*, 58 Kans. 331.

§ 4. MALICE.

To make out a breach of duty by the defendant, the plaintiff must also produce evidence that the prosecution was instituted with express or actual malice towards the accused.¹ Malice is not to be inferred *because* of mere proof of a want of probable cause,² any more than want of probable cause is to be inferred because of mere proof of malice; it may be inferred as a *fact* from want of probable cause, but it is not a necessary inference.³ A man may institute a prosecution against another without malice either in the legal or the popular sense, though he had no sufficient ground for doing so.⁴

Express malice necessary: evidence of malice: a question of fact. The jury must be allowed, and it is their duty, to pass upon the question of malice as a distinct matter. There is therefore no such thing in the law of malicious prosecution as implied malice or malice in law.⁵ For example: Evidence having been introduced in an action for a malicious prosecution, which showed that the defendant had instituted the

¹ *Vanderbilt v. Mathis*, 5 Duer, 304; *Pangburn v. Bull*, 1 Wend. 345; *Carson v. Edgeworth*, 43 Mich. 241; *Dietz v. Landfitt*, 63 Penn. St. 234; *Gabel v. Weisensee*, 49 Texas, 131; *Hicks v. Brantley*, 102 Ga. 264; *Torsch v. Dell*, 88 Md. 459, 468, laying down the meaning of the term. *Vinal v. Cove*, 18 W. Va. 1, 26, also declaring the meaning of malice. Personal ill-will is not necessary. Besides the cases just cited see *Spear v. Hiles*, 67 Wis. 350; *Lunsford v. Dietrich*, 93 Ala. 565; *Forbes v. Haganman*, 75 Va. 168. See ante, pp. 25-27.

² *Vanderbilt v. Mathis*, 5 Duer, 304; *Griffin v. Chubb*, 7 Texas, 603, 617.

³ *Fugate v. Millar*, 109 Mo. 281; *Tucker v. Cannon*, 32 Neb. 444; *Closson v. Staples*, 42 Vt. 209; *O'Neal v. McKinna*, 116 Ala. 606; *Hicks v. Brantley*, 102 Ga. 264; *Helwig v. Beckner*, 149 Ind. 131; *McGowan v. McGowan*, 122 N. Car. 145; *Carson v. Edgeworth*, 43 Mich. 241; *Dietz v. Langfitt*, 63 Penn. St. 234. But see *Torsch v. Dell*, 88 Md. 459, 467, that want of probable cause raises a *prima facie* presumption of malice, on authority of *Boyd v. Cross*, 35 Md. 197; which is contrary to the authorities generally.

⁴ *Griffin v. Chubb*, supra, at p. 616. As to the different forms of malice, see ante, pp. 25-27.

⁵ *Mitchell v. Jenkins*, 5 B. & Ad. 588; *Carson v. Edgeworth*, supra.

prosecution without probable cause, the judge instructs the jury that there are two kinds of malice, malice in law and malice in fact, and that in the present case there was malice in law because the prosecution was wrongful, being without probable cause. This is erroneous; the existence of malice is a question for the jury.¹

§ 5. DAMAGE.

If the charge upon which the prosecution was instituted was such as (being untrue) would have constituted actionable slander had it not been preferred in court, the plaintiff, upon proof of the termination of the prosecution, the want of probable cause, and malice, has made out a case, and is entitled to judgment. It is not necessary for him to prove that he has sustained any pecuniary damage. For example: The defendant causes the plaintiff to be indicted for the stealing of a cow, falsely, without probable cause, and of malice. The plaintiff is entitled to recover without producing evidence that he has sustained any actual damage.²

When damage
need not be
proved.

But it has been decided that it is only for the prosecution of a charge the mere oral imputation of which would constitute actionable slander that the institution of the prosecution can be actionable without damage.³ For example: The defendant falsely prefers against the plaintiff a simple charge of assault and battery, without cause and with malice. The plaintiff cannot recover for a malicious prosecution without proof of special damage.⁴

¹ *Mitchell v. Jenkins*, *supra*; *Vanderbilt v. Mathis*, *supra*.

² See *Frierson v. Hewitt*, 2 Hill (S. C.), 499; *Byne v. Moore*, 5 *Taunt*. 187, *Mansfield*, C. J.; *s. c. L. C. Torts*, 181.

³ *Byne v. Moore*, *supra*. See *Quartz Hill Mining Co. v. Eyre*, 21 *Q. B. Div.* 674, 692.

⁴ *Byne v. Moore*, *supra*.

§ 6. NON-DEFAMATORY PROSECUTIONS AND SUITS: DAMAGE.

The right of action, so far as there is any, for prosecutions criminal or civil, which are not defamatory, is, by many of the American authorities, a question of special damage.¹

Legislation in England, beginning with the Statute of Marlbridge or Marlborough,² has been passed entitling the Civil suits: costs: fees. successful party in a civil cause to costs; the effect of which, after much fluctuation of opinion, is finally held to be that all right of action for a false and malicious civil suit, not importing defamation, is taken away. The right to costs is deemed to satisfy any damage the successful party may have sustained.

In this country the law is in a state of confusion. Some of our courts hold, with the courts of England, that the right to costs takes the place of any right of action for the suit; others hold the contrary, but on varying grounds. These latter authorities take the position that costs can seldom make good the loss sustained in defending an unfounded suit; but they do not agree in what the supposed loss as a ground of action consists. It is sometimes said that it may consist in the expense, in one form or another, to which the plaintiff was put; sometimes it is found in the arrest of the party or in the attachment of his property, where such a thing took place.³

¹ Among the cases holding special damage necessary, see *Bitz v. Meyer*, 40 N. J. 252; *Smith v. Michigan Buggy Co.*, 175 Ill. 619; *Terry v. Davis*, 114 N. Car. 31; *Mayer v. Walter*, 61 Penn. St. 285; *Muldoon v. Rickey*, 103 Penn. St. 110; *Mitchell v. Southwestern R. Co.*, 75 Ga. 398; *Smith v. Hintrager*, 67 Iowa, 109. Contra, *Closson v. Staples*, 42 Vt. 209, and other cases cited, *infra*.

² 52 Hen. 3, c. 1.

³ See *Kolka v. Jones*, 6 N. Dak. 461; *Closson v. Staples*, 42 Vt. 209; *McCardle v. McGinley*, 86 Ind. 538; *Eastin v. Stockton Bank*, 66 Calif.

Each of these positions has its difficulties. What is meant, in the first of the two, by 'expense'? The ordinary and necessary expenses attending an action — the fees of court — can hardly be damage; such expenses are only a species of taxation, and in most cases these would be too slight to be considered an equivalent of damages sustained in a prosecution. Counsel fees might stand upon a different footing; but there has always and everywhere been a strong aversion against considering the payment of lawyers' fees as a ground of claim. Such expenses differ in great degrees, and upon no uniform or 'natural or probable' basis; whereas damage in the legal sense is the natural or probable result of what produced it.

Arrest or attachment of property is oftener treated as constituting damage.¹ That perhaps is thought to be the equivalent in a civil suit for the arrest in a criminal Arrest or attachment. prosecution; but in such a prosecution, where the charge is defamatory as usually it is, it is not necessary that damage should be proved, and proof of the arrest is but an incident of the case — it is not proof of damage. Indeed it is well held that an arrest in a suit for a malicious civil prosecution is not damage, that is to say, special damage, the sort of loss to be proved.² It is plainly a confusion which has led courts to treat an arrest, or an attachment, alone as special damage. The action for false imprisonment cannot be taken as analogous, for special damage is not necessary in such an action. Arrest or attachment is not in itself special damage, though of course special damage may result from it.

123; *Woods v. Finnell*, 13 Bush, 628; *Antcliff v. June*, 81 Mich. 477; *Smith v. Burrus*, 106 Mo. 94; *Lipscomb v. Shofner*, 96 Tenn. 112; *Ailstock v. Moore Lime Co.*, 104 Va. 565.

¹ *Ailstock v. Moore Lime Co.*, 104 Va. 565. There is a tendency indeed to give the action though property was not seized or the person molested. *Id.* at p. 570; *Antcliff v. June*, 81 Mich. 477, 45 N. W. Rep. 1019, 10 L. R. A. 621, 21 Am. St. Rep. 533; *Kolka v. Jones*, 6 N. Dak. 461; *Closson v. Staples*, 42 Vt. 209.

² *Byne v. Moore*, 5 Taunt. 187.

On the whole it should seem that if the courts are to maintain a distinction between defamatory and non-defamatory

What constitutes damages needs definition. suits for malicious prosecution the rule that special damage is necessary in the second class of cases should be more clearly and consistently declared,

at least to this extent, that it should be shown that the plaintiff has suffered, not merely the restraint of an arrest or the attachment of his property, but some recognized legal detriment over and beyond that of ordinary trouble or expense; for instance, in the case of an arrest or attachment, that a breach of contract with damages was the result.

And is not the sound distinction the one suggested — that between defamatory and non-defamatory prosecutions?

There is no difference between words spoken out of court and words spoken in court, beyond the need of greater protection in the second case; and that is provided for

Defamatory words. by the requirement of proof of malice and want of probable cause. If the words would in themselves be actionable as slander or libel, they should be actionable without proof of damage in a suit for malicious prosecution; if damage would be necessary in a suit for defamation, it should be required in a suit for a prosecution employing them. Apart from this doctrine, the decisions which declare that special damage is not necessary in any case are to be preferred, as affording another plain and practicable rule of law.¹

§ 7. WANT OF JURISDICTION.

If the prosecution fail by reason of the circumstance that the court in issuing its warrant exceeded its jurisdiction, or
What action proper. that the warrant or indictment was defective, the question may arise whether the accused should

¹ *Closson v. Staples*, 42 Vt. 209, and *Kolka v. Jones*, 6 N. Dak. 461, reviewing the authorities, are good examples. There was no arrest or attachment in either of these cases. They both repudiated, and rightly, any distinction based upon such acts. See also *Antcliff v. June*, 81 Mich. 477, 10 L. R. A. 621; *Ailstock v. Moore Lime Co.*, 104 Va. 565.

sue for malicious prosecution, for false imprisonment if there was an arrest, or for slander if the charge was defamatory. In certain cases it is plain that he may bring an action for false imprisonment; for which the reader is referred to the chapter on that subject. It would give him an obvious advantage to sue for slander, since then he would not be compelled to prove a want of probable cause or the existence of malice; it may be that that remedy is applicable.¹ The ordinary remedy against the prosecutor appears to be an action for malicious prosecution,² at least where the question of jurisdiction is one of fact, as in regard to the place where an alleged offence was committed; in reality the court has jurisdiction in such a case, so far as finding the fact is concerned.³ If the prosecutor participated in making a false arrest, the suit might be false imprisonment.

§ 8. KINDRED WRONGS.

In connection with malicious prosecution there is a whole group of kindred wrongs, kindred in name at least, which deserve to be distinguished and explained; to wit, wrongs of malicious arrest, malicious attachment or execution, malicious search, and malicious abuse of process, — and perhaps others.

¹ See L. C. Torts, 205, and cases cited.

² Pippet *v.* Hearn, 5 B. & Ald. 634; Ailstock *v.* Moore Lime Co., 104 Va. 565, reviewing the cases; Antcliff *v.* June, 81 Mich. 477, 45 N. W. Rep. 1019, 10 L. R. A. 621; Morris *v.* Scott, 21 Wend. 281; Stone *v.* Stevens, 12 Conn. 219; Hays *v.* Younglove, 7 B. Mon. 545; Shaul *v.* Brown, 28 Iowa, 37. See Braveboy *v.* Cockfield, 2 McMull. 270; Turpin *v.* Remy, 3 Blackf. 210. Contra, Bixby *v.* Brundige, 2 Gray, 129. If the supposed court was no court known to the law, as e. g. if it was only some self-constituted body like a vigilance committee, an action for defamation could certainly be maintained.

³ Bitz *v.* Meyer, 40 N. J. 252. In regard to *void* proceedings, as where criminal proceedings are begun for what is not a crime, see Krause *v.* Spiegel, 94 Calif. 370; Vinal *v.* Core, 18 W. Va. 1, 23; Satilla Manuf. Co. *v.* Cason, 98 Ga. 14; Collum *v.* Turner, 102 Ga. 534; Bixby *v.* Brundige, 2 Gray, 129. These decisions deny any right of action for malicious prosecution in such a case.

These wrongs differ as a whole from malicious prosecution in this, that while the prosecution in the last-named wrong is an original proceeding, the arrest, attachment, execution, or other act in these kindred wrongs is usually a secondary or ancillary proceeding in some original action which may have been perfectly lawful. It will be assumed accordingly that the original proceeding in these cases was lawful. How these wrongs severally differ from malicious prosecution will now be seen.

Malicious arrest as a tort differs from malicious prosecution in perhaps two particulars touching the proof required to make a cause of action, to wit, malice and the termination of the prosecution or suit.

In regard to malice, it appears to be enough that the arrest was wrongful, — in what way is probably immaterial. Thus Malice : prob. it appears to be enough that the arrest was without cause. out probable cause; malice, if that is true, being only a fiction and not a distinct entity requiring proof.¹ If however malice is an entity and hence must actually be proved, as for instance by evidence that the defendant procured the arrest with knowledge that there was no probable cause for it,² there is no difference in point of malice between the two wrongs. However that may be, it is clear that malice, in whatever sense, would not make an arrest wrongful, if there was probable cause for it; there is no difference between the two wrongs in that particular.

In regard to the termination of the prosecution, it seems to be held in England that an action for a malicious arrest under secondary process cannot be brought until Termination. the *original* prosecution or action has come to an end.³ But such a rule would appear to be unsound. It

¹ As to malice as an entity and malice as a fiction, see *ante*, pp. 25-27.

² *Ante*, p. 25. See *Swift v. Witchard*, 103 Ga. 193, 196.

³ *Jenings v. Florence*, 2 C. B. n. s. 467; *Grainger v. Hill*, 4 Bing. N. C. 212, *Tindal*, C. J. *Jenings v. Florence*, the later of these cases,

should seem to be enough that the warrant has been set aside, if any termination of proceedings be necessary. Thus if a man has been wrongfully arrested in an action on contract, he ought in reason to be entitled to sue at once upon discharge for any damage he has sustained, and not compelled to wait the event of the original action.¹ The chief reason for requiring a termination of the prosecution, in suits for malicious prosecution, to wit, that otherwise there might be inconsistent judgments, is not true of the case in question; judgment that the defendant procured the *arrest* wrongfully cannot be inconsistent with the right of that party to judgment on the contract. Such is the American doctrine in regard to malicious attachment,² as will be seen; and it may well be doubted whether there is any ground for a distinction on this point between the two cases.

Damage must no doubt be proved unless the arrest was procured by defamatory allegations which as slander ^{Damage.} would be actionable per se. There appears to be no difference between cases of malicious arrest and malicious prosecution in that respect.

To sum up: In an action for a malicious arrest the plaintiff has to prove want of probable cause, the termination of the proceeding in which the arrest was made, — possibly of the original proceeding, — and damage or not, according to the nature of the allegations made in procuring the arrest. If the process was void on its face, the case is one for an action for false imprisonment.³

Malicious attachment as a tort appears to be very similar. Malice as a distinct entity, at least as motive, is no necessary

speaks only of a termination of the proceedings; but in *Grainger v. Hill* it is said that the original suit must have terminated. For other cases in regard to malicious arrest, see *Daniels v. Fielding*, 16 M. & W. 200; *Gibbons v. Alison*, 3 C. B. 181; *Phillips v. Naylor*, 4 H. & N. 565.

¹ See *Swift v. Witchard*, 103 Ga. 193, 196.

² *Zinn v. Rice*, 154 Mass. 1.

³ See the chapter on that subject for the nature of such an action.

part of the cause of action, though it may well be present and strengthen a case already made.¹ An attachment of property could not be wrongful simply because Malice: probable cause: it was procured by malicious motives. What excessive levy. must be proved is want of probable cause, as by evidence that the attachment was manifestly excessive,² and damage; and that is all, unless knowledge of want of probable cause is required.³

It is not necessary for the plaintiff (defendant in the original suit and attachment) to await the result of the original action; enough that the malicious attachment has Termination. worked damage to the plaintiff. The rule in malicious prosecution requiring a termination of the original proceedings is, by its terms and nature, limited to prosecutions 'to establish a charge or cause of action, and cannot include an ex parte use of process incidental and collateral thereto, 'in defence to which the falsity of the charge cannot be shown.'⁴ Hence there is no inconsistency between the suit for the malicious attachment and the suit in which the attachment was made.

Where attachment of property is procured under statutory authority only, the attaching party's justification must of course be found in the statute. Whether the act Statutory attachment. is wrongful or not, and what must be proved to make a cause of action, will be determined accordingly. But it is believed that the statutes in such cases always require the person attaching to show probable cause. Want of probable cause and damage would accordingly make a case, as in non-statutory attachment.

¹ See *Zinn v. Rice*, 154 Mass. 1, in its statement of facts.

² *Savage v. Brewer*, 16 Pick. 453.

³ If the attachment was manifestly excessive, the attaching party would know that there was no probable cause, and that would be malice or the equivalent. *Savage v. Brewer*, 16 Pick. 453; *Somner v. Wilt*, 4 Serg. & R. 19. See ante, pp. 25-27. For other cases of malicious attachment, see *Stewart v. Cole*, 46 Ala. 646; *Spengler v. Davy*, 15 Gratt. 381.

⁴ *Zinn v. Rice*, supra, W. Allen, J.

In regard to malicious execution, little need be said.¹ Malice as motive could not make the levy wrongful, if it was otherwise rightful; a manifestly excessive levy however would probably be wrongful, but it would be wrongful only in respect of the excess, supposing the subject severable, and of any damage done.² For such damage the officer would be liable accordingly; the plaintiff in the execution also, if he directed or participated in the wrong. The action, whether in such a case, or for levying execution of a judgment known to be satisfied,³ would naturally be for a wrongful taking of property, — trespass, trover, or the like, — a very different remedy from that for a malicious prosecution.⁴

Malicious search is in this country a statutory wrong, though possibly a common-law wrong also. It has even been made a subject of constitutional law; taking that form on or after the separation of America from England, because of differences which had arisen between the colonies and the mother country over search warrants.⁵ The fourth amendment to the Constitution of the United States provides that ‘no warrants shall issue but upon *probable cause*, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.’ This

Statutory and
constitutional
wrong: what
must be
proved.

¹ See *Churchill v. Siggers*, 3 El. & B. 938; *Jenings v. Florence*, 2 C. B. N. s. 467; *Craig v. Hasell*, 4 Q. B. 481; *Somner v. Wilt*, 4 Serg. & R. 19; *Hilliard v. Wilson*, 65 Texas, 286.

² *Hall v. Leaming*, 2 Vroom, 321. In this case it is laid down that the action lies only when the creditor has made a levy for more than is due, ‘maliciously and without reasonable or probable cause, i. e. the creditor well knowing that the sum for which the execution has been sued out is excessive, his motive being to oppress and injure the debtor.’ Perhaps the last clause (about motives) is unnecessary. See *Bitz v. Meyer*, 40 N. J. 252, 255; *Zinn v. Rice*, 154 Mass. 1; *Savage v. Brewer*, 16 Pick. 453; the Massachusetts cases being cases of attachments.

³ *Deyo v. Van Valkenburgh*, 5 Hill, 242. ⁴ See later chapters.

⁵ As writs of ‘assistance’ of government officers.

is only a solemn declaration of the English common law.¹ What must be proved to set aside the warrant, or to make a cause of action if the warrant has done its work, is indicated by the quotation; though if the warrant was absolutely void, the remedy will be trespass or trover.

In the last of these kindred wrongs, malicious abuse of process, process which in itself may have been lawful has

Nature of the wrong: what must be proved. been perverted to a purpose not contemplated by it. In other words the exigency of the writ has not been followed. Malice again, as a distinct

entity, plays no part in the case; all that is required for a cause of action is proof that the writ has been applied to a purpose not named or implied by it, to the damage of the plaintiff. Perversion or 'abuse' of the process gives the name 'malicious' to the case; the malice is fictitious, or may be.

It is not necessary for the plaintiff to wait the termination of the original proceeding² or, since the process has not been followed, to prove that there was no probable cause for the issuance of the particular process. For example: The defendant, under a warrant for the arrest of the plaintiff in an action of debt, according to law, makes use of the same to extort property from the plaintiff, in which he succeeds, to the damage of the plaintiff. The plaintiff sues for the loss while the action of debt is pending, and without alleging want of probable cause. He is entitled to recover.³

Recent English decisions have also brought to light the existence of a right of action for maintenance.⁴ This is a

¹ *Spangler v. Booze*, 103 Va. 276; *Olsen v. Trite*, 46 Minn. 225, 48 N. W. Rep. 914; *Whitson v. May*, 71 Ind. 269. These cases show that it makes no difference that no goods were found.

² *Mayer v. Walter*, 64 Penn. St. 283; *Grainger v. Hill*, 4 Bing. N. C. 212.

³ *Grainger v. Hill*, 4 Bing. N. C. 212. The original suit itself was premature, the debt not being due; but that made no difference.

⁴ *Bradlaugh v. Newdegate*, 11 Q. B. D. 1; *Harris v. Brisco*, 17 Q. B. Div. 504; *Metropolitan Bank v. Pooley*, 10 App. Cas. 210.

tort founded upon early statutes making maintenance a criminal offence;¹ an action for damages being permitted only where the defendant has aided the prosecution of some suit in which he had no interest or, it seems, motive other than that of stirring up or keeping alive strife. It has lately been decided that if the defendant's conduct was based on charity, reasonable or not, the action will fail.²

¹ It is doubtful if a corporation can be liable for the offence. 10 App. Cas. at p. 218, Lord Selborne.

² *Harris v. Brisco*, *supra*.

PART II.

INCOLPABLE MIND.

In the case of acts or omissions falling under this head the defendant's liability does not necessarily turn upon his special mental attitude (apart from volition in what was done or omitted).

ILLEGAL ACTS.

CHAPTER VI.

PROCURING REFUSAL TO CONTRACT.

Statement of the duty. A owes to B the duty not to interfere with B's enjoyment of the fruits and advantages of B's enterprise, industry, skill, and credit, to B's damage, without lawful excuse.¹

The struggle going on between capital and labor on the one hand, and between the public and both of these forces on the other, accounts for the present chapter and more or less of the next following one. So far as the present chapter is concerned, this is true both of the plaintiff's side in making a *prima facie* case and of the defendant's side in its most significant form, competition.

As for the plaintiff's side, those have had logic with them, — the logic of the common law of the nineteenth century, — who have maintained, with reference to cases of hindering contract by acts not in themselves wrongful, that a man has the legal right to say what he pleases, to induce, to advise, to exhort, to persuade;² but law is not logic, — it is the expression of the dominant social force, so far as that succeeds in its purpose.³

¹ The subject, it will be seen, is wider than the title (Procuring Refusal to Contract), and it is wider perhaps than this statement of the duty. See *Nolin v. Pearson*, 191 Mass. 283, 290, Braley, J. But the title presents the typical and ordinary case.

² Lord Herschell, in *Allen v. Flood*, 1898, A. C. 1, at p. 138. See also Field, C. J., in *Rice v. Albee*, 164 Mass. 88.

³ *Ante*, pp. 4-7.

As for the defendant's side, the common law of the nineteenth century followed the political economists of the time in the doctrine of freedom of contract; which in the end led, where logic must have said it would lead, to monopoly. Freedom of contract is incompatible with restrictions upon competition;¹ and the efforts of the courts (to say nothing of legislation) to avoid that result are in the teeth of logic,—they are due to the struggle of social forces and justifiable accordingly. The contest being as nearly even-handed as it has been, the legal resultant does not show as great a deflection as if the public had prevailed completely; but that there has been deflection the following pages will clearly show.

It is apprehended then that any attempt to explain the newer authorities on hindering contract, on other grounds than of the struggle of social forces to make the law, is academic in nature and misleading in fact.

§ 1. WHAT MUST BE PROVED.

To make a *prima facie* cause of action for procuring refusal by a third person to contract with the plaintiff, or what is the same thing, to continue to contract with him upon the termination of an engagement, where such third person would have made or continued the contract but for the defendant's act, three things must be proved; namely, notice by the defendant of the plaintiff's relation to the third person, interference with that relation, and actual damage.

§ 2. HINDRANCE: WRONGFUL CONDUCT: COMBINATION.

Nothing need be said in regard to the first requirement; but what is meant by the second? That is the most difficult question touching the cause of action.

¹ *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25. This case is the sufficient evidence that the common law did not oppose monopoly resulting from competition. The American authorities are now yielding to pressure and *leaning* the other way, that is towards restricting competition. See *infra*, § 4.

The 'statement of the duty,' supra, suggests the general answer. The plaintiff is entitled to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. The law recognizes the right of every man to engage in any legitimate business or occupation he may choose, free from hindrance, except so far as hindrance may result from the exercise of the like right by others or as may be excused by the law.¹ Hindrance then makes (with the other elements of liability) a *prima facie* case.

Whether this hindrance should in itself be wrongful, as where it is caused by intimidation, threats, misrepresentation, or other like conduct, has been a matter of dispute. One thing must be admitted, that there is no general, in the sense of universal, rule of law that to inflict damage intentionally makes a *prima facie* cause of action. The law of deceit, of slander of title, and of malicious prosecution, certainly no inconsiderable part of the law, is otherwise, as we have already seen.² And the conscious or unconscious influence of that fact and similar facts has caused some of our courts to maintain the view, that the hindrance in question should be wrongful in itself, as a matter of fact, and not as matter of law due to its being an intentional infliction of damage. For example: The defendant, it is alleged in the declaration, procures X, with whom the plaintiff is in negotiations for a partnership in trade, to put an end to the negotiations, by telling X that the plaintiff is in embarrassed pecuniary circumstances. No wrongful acts are done by the defendant, and there is nothing to show that his statements

¹ *Brennan v. United Hatters of North America*, 65 Atl. Rep. 165 (N. J.). There is no ground for distinction, sometimes suggested (*May v. Wood*, 172 Mass. 11), between interfering with an 'existing' business, or a business to be set on foot, or obtaining contracts merely. No authority has adopted the suggestion, and it has been expressly repudiated. *Allen v. Flood*, 1898, A. C. 1, 132-136, Lord Herschell.

² *Ante*, pp. 31-34; also the chapters on the subjects named.

in regard to the plaintiff are false. This, it has been held, does not show any cause of action.¹

This example probably would not now be accepted in the State in which it arose; there and in other States it is now held that the hindrance need not be unlawful in itself, and the law of deceit, slander of title, and malicious prosecution would be considered to stand upon ground of its own; at any rate where the hindrance was by a combination of men, as by a labor union. It is accordingly laid down, that whether the defendant effected his object by persuasion or by false representation, by strike or by boycott or picketing, or other act of the kind is immaterial, for the purpose of an action for procuring another to refuse to contract with the plaintiff, or refuse to continue to contract with him, when otherwise he would have made or continued the engagement in question.² The question on the newer authorities simply is, did the defendant, with notice of the plaintiff's rights, hinder him intentionally in exercising the same?

Whether it is necessary to such doctrine that the hindrance be caused by a combination is not however put beyond question;

^{Whether com-} but probably it is not. The case is commonly one of combination, and the fact of the power and danger of combinations is particularly noticed in the authorities. 'A single individual may well be left to take his chances in a struggle with'

¹ *Rice v. Albee*, 164 Mass. 88. The case, which arose on demurrer, is put in part on the ground that the statements are defamatory and should have been set out. See also *May v. Wood*, 172 Mass. 11, and *Boyson v. Thorne*, 98 Calif. 578, the last a case of procuring breach of contract. The court in *Rice v. Albee*, *supra*, distinguished interference with existing business or contracts.

² *Plant v. Woods*, 176 Mass. 492; *Berry v. Donovan*, 188 Mass. 353; *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. Rep. 753; *Klingel's Pharmacy*, 64 Atl. Rep. 1029 (Md.); *Franklin Union v. People*, 220 Ill. 355, 380; *Van Horn v. Van Horn*, 27 Vroom, 318; *Brennan v. United Hatters of North America*, 65 Atl. Rep. 165 (N. J.); *Booth v. Burgess*, *id.* 226. See *Vegelahn v. Guntner*, 167 Mass. 92.

another individual. But in a struggle with a number of persons combined together to fight an individual, the individual's chance is small. . . . The result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals to do.'¹ 'The line within which a combination of individuals like a labor union must confine its actions is a much narrower one than that within which the same individuals acting separately are confined.'²

The meaning of this appears to be, not that the objective act of hindrance in itself is different in the two cases, but that a single individual might not have the power to bring to pass what a combination could; if the one person did bring it to pass, he would be liable. That is, the doctrine is not based upon the inherent quality of the hindrance. One or two men standing in the middle of a large park might not be able, by making a noise, to disturb people in houses around the park, while fifty men might make a noise that would be 'maddening' to such people;³ but if in fact one or two did do it, that would be enough to make them amenable to the law. So the courts might well decline to enjoin a single person not backed by power, because he probably could not do harm. They might readily grant an injunction against a labor union. The later doctrine in regard to hindrance may perhaps be set down to the pressure of social forces;⁴ the danger in cases of

¹ *Pickett v. Walsh*, *supra*, *Loring, J.*; *Klingel's Pharmacy v. Sharp*, 64 Atl. Rep. 1029 (Md.). 'Enough,' say the court in the last case, 'that the combination is a means of accomplishing an unlawful act.' The court in the same case make the motive of the defendants material, as in *Plant v. Woods*, *supra*. See *infra*.

² *Pickett v. Walsh*, *supra*.

³ *Lambton v. Mellish*, 1894, 3 Ch. 163; *Thorpe v. Brumfitt*, L. R. 8 Ch. 650; *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25, 38, 45, 52, 60; s. c. 23 Q. B. Div. 598, 616, 624; *Quinn v. Leathem*, 1901, A. C. 495, 538; *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. Rep. 753. *Lambton v. Mellish* was a case of rival caterers in a public place, trying to outdo each other by 'maddening' noises to get business. Injunction was granted.

⁴ *Ante*, p. 33.

combination as seen by such forces being obvious and overwhelming, while it might not be noticeable in the case of the acts of a single person. And it makes no difference that the representatives alone are sued, for the power of the combination is behind them. For example : The defendants are officers of a trade union of butchers. The members of the union have adopted a rule that they will not work with non-union men or cut up meat coming from a place where non-union men are employed. The plaintiff is a butcher, not a member of the union, and has men in his employ who are non-union men. By invitation of the secretary of the union he attends a meeting of the union, which the defendants also attend. The plaintiff now offers to pay whatever is required to enable his men to become members of the union, but the offer is refused, and a vote is passed to call out the plaintiff's men. Threat is also made and afterwards carried out to call out the men of one of the plaintiff's customers, and the customer now ceases to deal with the plaintiff. The defendants forward these proceedings. They are liable, though a single individual, without support, might not be, not because the act is different in nature in the two cases, but because of the power of the combination behind the defendants.¹

The point is significant in case of strikes. A strike as such need not interfere with the legal rights of any one, though as a matter of fact it is apt to do so. Indeed a strike may be illegal ; whether a strike is illegal or not will turn upon the question what it aims at². A strike for

¹ Quinn *v.* Leathem, 1901, A. C. 495, especially the judgment of Lord Lindley. 'Numbers,' his lordship well says at p. 538, 'may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable and produce a result which one alone could not produce.' On this point the famous case of Allen *v.* Flood, 1898, A. C. 1, was probably wrong ; the walking delegates must have had the power of their union behind them. See Quinn *v.* Leathem, remarks of Lord Lindley. This latter case practically overrules Allen *v.* Flood on its construction of the facts ; on that point, as Lord Lindley points out, the decision could not be binding.

² Pickett *v.* Walsh, 78 N. E. Rep. 753, 192 Mass. 572; Erdman *v.*

instance intended to force an employer to pay a fine imposed upon him by a labor union, of which the employer is not a member, for not giving the union all of his work, would be unlawful.¹ So too a strike to create a boycott or a sympathetic strike, and so cut off labor or supplies from the employer struck against, would be unlawful.² So of a strike to compel men to join a labor union or other body.³ Such results could hardly be brought to pass by a single individual acting of himself alone; but the quality of the hindrance would be the same whether the purpose was formed by one or by many. This appears to be all there is in the mooted question whether several can be liable for acts for which a single person would not.⁴

So far as hindrance is concerned, nothing more than intentional hindrance appears to be required.⁵ It should follow that malice, in the sense of bad motives or of wanton or reckless conduct, is not necessary to the action;

Malice. though it may be sufficient with other facts to show that the defendant is liable. If the case however must still be put in terms of malice, which with all caution is apt to be misleading, it is only necessary for the present purpose to say that proof of the intentional procuring, with notice and damage, is malicious in law; which simply means that it is wrongful and actionable.⁶ But there are other aspects of malice; these will now be considered.

Mitchell, 207 Penn. St. 79; *In re Dolittle*, 23 Fed. Rep. 544; Old Dominion Steamship Co. v. McKenna, 30 Fed. Rep. 48; *Crump v. Commonwealth*, 84 Va. 927; *Quinn v. Leathem*, 1902, A. C. 495.

¹ *Carew v. Rutherford*, 106 Mass. 1; *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. Rep. 753.

² *Pickett v. Walsh*, *supra*.

³ *Plant v. Woods*, 176 Mass. 492; *Perkins v. Pendleton*, 90 Maine, 166; *Lucke v. Clothing Cutters Assembly*, 77 Md. 396.

⁴ That appears to be the explanation of *Allen v. Flood*, 1898, A. C. 1, assuming it to be true that the defendants did not have the power to bring about the wrong in question, — which may be doubted.

⁵ Qu. of negligent hindrance and procuring?

⁶ ‘Malice,’ say the Court of Errors of New Jersey, ‘is commonly treated

§ 3. MALICE: EFFECT ON CAUSE OF ACTION OR DEFENCE.

The plaintiff however says that what the defendant did he did maliciously, not in the sense of a legal inference, but as a matter of fact, or the defence set up is that what was done in malice was done of legal right, as for instance of competition;¹ what will be the result? The question has been much discussed; for though, as we have seen, malice is not necessary to the cause of action in the class of cases under consideration, it does not follow that malice may not play a part there or in defence. That it may well do so, and that it does, is plain; but what part it plays has been the difficult question.

The discussion has sometimes been to little purpose, *Effect of malice according to the case: three cases.* for a question which in itself appears simple enough. The case may, it should seem, be put thus: —

First, the defendant's malice may have carried him altogether away from any defence of legal right which he might have had; that is, he may not have acted upon his rights at all; he has been driven (by impulse of malice) off his true and upon a false course. For example: The plaintiff sues the defendant for intentionally depriving the

as an essential ingredient of an action like the present. But malice in the law means nothing more than the intentional doing of a wrongful act, without justification or excuse. *King v. Patterson*, 20 Vroom, 418; *McFadden v. Lane*, 42 Vroom, 624, 630. And what is a wrongful act within the meaning of this definition? We answer, any act which in the ordinary course will infringe upon the rights of another, to his damage, is wrongful, except it be done in the exercise of an equal or superior right.' *Brennan v. United Hatters of North America*, 65 Atl. Rep. 165 (N. J.). That is the usual language of the courts at present. The case is practically the same as in slander and libel, where the term 'malice' has fairly been driven out of the field, in the statement of the cause of action. It is surplusage. So here judges are beginning to drop it. See *ante*, p. 27, note.

¹ *Ante*, pp. 32-34. On the various meanings of 'malice,' *ante*, pp. 25-27. Does competition really rise above permissive right? *Post*, p. 266.

plaintiff of the benefit of the shipment of a cargo of tea, which benefit the plaintiff would have had but for such act of the defendant. The defence is that the damage done to the plaintiff was done in pursuance of competition as a legal right. The evidence however is that the defendant caused the tea in question to be thrown overboard from a ship belonging to a third person, who was accustomed to supply the plaintiff with cargoes of tea, and would have supplied him with the tea in question, though not bound to do so, had not the defendant prevented. The defendant has not acted upon any legal right, and is liable.¹ Again: The defendants, masons and pointers, have a legal defence of competition against the plaintiffs engaged in the same business; but they cause a sympathetic strike to compel X to force the plaintiff's employers to yield to the defendants' competition for the business which the plaintiffs are doing. The defendants are not, in that particular, acting upon their legal rights.²

Secondly, the defendant's malice may have had an intermediate effect, resulting in excess; that is, it may have caused the defendant to press his legal right too far — it may have been a case for instance of unfair competition, like that familiar to the law of trademarks. A case of the kind is made where the evidence shows that the defendant resorted to threats, intimidation, false statements, defamation or the like in the course of the competition. Here malice as

Second case
of malice.

¹ See *Mogul Steamship Co. v. McGregor*, *supra*; also the Boston 'Tea Party' of 1773.

² *Pickett v. Walsh*, 192 Mass. 572. Loring, J. (for the court): 'In our opinion organized labor's right of coercion and compulsion is limited to strikes on persons with whom the organization has a trade dispute; or to put it in another way, we are of opinion that a strike on A, with whom the striker has no trade dispute, to compel A to force B to yield to the strikers' demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best. Only two cases to the contrary have come to our attention, namely, *Bohn Mfg. Co. v. Hollis*, 54 Minn. 233, and *Clothing Co. v. Watson*, 168 Mo. 133. The first of these two cases was overruled on this point in *Gray v. Building Trades Council*, 91 Minn. 171.' Many cases are then cited as supporting their own decision.

motive enters into the question whether there was a legal right (not of competition, which of course is a legal right, but) on the whole evidence relating to the right to do what was done. The question in other words is, whether the defendant did not lose the right he had, by what his malicious motive led him to do, in the excess. For example: The defendants, members of a labor union, from which the plaintiffs had withdrawn and formed a rival union, conspire to compel the plaintiffs, against their will, to rejoin the first one. In pursuance of the purpose the defendants bring pressure to bear upon employers of the plaintiffs, by threatening strikes and boycotts, with the usual results, to get them to induce the plaintiffs to rejoin the first union, and in case of the plaintiffs' refusal, to discharge them; but no violence is done. The defendants have no legal right to do what they are doing; their conduct is in excess of any legal right they might have.¹

Thirdly, malice may appear in connection with a clear case of legal right, as where the plaintiff and defendant were competing with each other in regard to rates of freight; the case being simply that the defendant was actuated by malice (in the sense of an evil motive,—malvolence), and that is all. Now on common-law doctrine it is plain that the malice of the defendant in such a case has no bearing upon his defence; the defence is good notwithstanding the malice; the malice has had no harmful result—it has only caused the defendant to do what he was by law entitled to do. In other words the defendant's malice was merely a cause without effect in damage as *injuria*—the *damnum* was

¹ *Plant v. Woods*, 176 Mass. 492,—injunction obtained. The purpose of the defendants, it was laid down, would not bring their acts ‘under the shelter of trade competition.’ p. 502. That is, the purpose did not call for the acts,—the acts were in excess of the legal right; that right was lost. See also *Klingel’s Pharmacy v. Sharp*, 64 Atl. Rep. 1029 (Md.), on the materiality of the motive, following *Plant v. Woods*, *supra*. Refusal to sell goods is not the exercise of a legal right, if such refusal is a mere step in the development of a scheme to forestall the market in restraint of trade or drive the plaintiff into an organization to control prices against his will. *Id.*

absque injuria and must be disregarded. For example: The defendants, rivals of the plaintiffs in the tea trade of China, intend to inflict loss upon and cripple the plaintiffs, and drive them out of the business, and they resort to measures which accomplish their purpose; but they do nothing overstepping the line of competition. They are not liable.¹

This assumes that the defendant has really acted upon his legal right, and not in excess of it; he has simply enforced his legal right in hatred or other malicious spirit towards the plaintiff, without anything further.² And it is common-law doctrine of the *nineteenth* century that exempts the defendant.

§ 4. DEFENCE OF LEGAL RIGHT: COMPETITION.

These remarks are based upon the common law, but they lead up to one of the most serious questions of the present time. Freedom of competition is a consequence of the economic and legal doctrine of freedom of contract, which has prevailed throughout the nineteenth century and until the present day, except in so far as it has been restricted by statute. But freedom of competition leads, as authorities already referred to show,³ directly to monopoly;

¹ *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25. According to Lord Alverstone, *C. J.*, *Read v. Friendly Soc. of Stonemasons*, 1902, 2 K. B. 88, 97, referred to *infra*, is a case of the kind. Other examples: *London Guarantee Co. v. Horn*, 206 Ill. 493, *infra*; *Brennan v. United Hatters of North America*, 65 Atl. Rep. 165 (N. J.); *Van Horn v. Van Horn*, 27 Vroom, 318. It may be difficult to decide in some cases when the limits of an indefinite right, such as competition, have been reached, as in *Pickett v. Walsh*, 192 Mass. 572, where it was held that the limit had not been passed in a matter of competition between stonemasons, apart from causing a sympathetic strike.

² As in the case of enforcing an execution. In *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. Rep. 753, in which a defence of competition was upheld, the court found in the evidence that the defendants had not been actuated 'by a reckless and wanton, if not malicious disregard of the rights of the plaintiffs,' and said that it was not necessary to decide, and did not intimate, what would have been the result had the contrary been found.

³ See especially *Mogul Steamship Co. v. McGregor*, *supra*; also, New

the strongest competitor, driving out or (under freedom of contract) buying out the weaker ones, gains the whole field to himself, and the very result which the common law so much abhors comes to pass under its own favorite doctrine.

The tendency of legislation has of late been steadily in the opposite direction, of limiting freedom of competition and

hence of contract;¹ and this no doubt is an expression of what seeks to become the dominant force of society, to wit, a growing consciousness of a corporate capacity of the Public, apart perhaps from the State, and having rights accordingly of its own.²

Dominant force : the public restriction of competition : meaning of the term. Should this tendency be disregarded by the courts, on the footing that the subject is one for legislation only? It seems not. There appears to be no sufficient reason why the courts should not take note of and yield to the pressure, and gradually lay down restrictions to competition, where statute does not operate, corresponding to those of statute. The great subject for such action is combination. Statutes provide that combinations in restraint of trade, that is, combinations which are intended to monopolize trade, though otherwise reasonable and free from any malicious motive, are unlawful. May not the courts well recognize the same pressure of the public as a social force and declare that com-

National Forces and the Old Law, *Atlantic Monthly*, December, 1906; Centralization and the Law, Lecture II.

¹ See *United States v. Trans-Missouri Freight Assoc.*, 166 U. S. 290; *Addyston Pipe Co. v. United States*, 175 U. S. 211; *Northern Securities Co. v. United States*, 193 U. S. 360; *Chicago Wall Paper Mills v. General Paper Co.*, 147 Fed. Rep. 491, under Federal legislation. And the following under State statutes: *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401; *Dunbar v. American Tel. & Tel. Co.*, 79 N. E. Rep. 423 (Ill.); *Moore v. Bennett*, 140 Ill. 69, 29 N. E. Rep. 888; *Distilling and Cattle Feeding Co. v. People*, 156 Ill. 448; *People v. Sheldon*, 139 N. Y. 251; *Klingel's Pharmacy v. Sharp*, 64 Atl. Rep. 1029 (Md.); Centralization and the Law, 103, 118.

State laws limiting freedom of contract are constitutional. *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 410; *National Cotton Oil Co. v. Texas*, 197 U. S. 115.

² Centralization and the Law, 7.

binations of the kind are contrary to the true spirit of the common-law doctrine of competition? The tendency, already alluded to,¹ of courts to regard combinations as *means*, and of course wrongful means, is in that direction, and might be strengthened. It is perhaps still clearer to say that the combination to monopolize trade is a conspiracy, and hence unlawful not only as a criminal but also, and for that reason, as a civil wrong.² And certainly combination is power, and may exercise coercion where one person alone could not;³ which also may be considered in relation to the idea of competition.

There is another way of limiting freedom of competition, and that is, by a more strict definition of the term than has heretofore been given. It has been urged with great ability that if the end, competition, is justifiable, all the means leading to that end are equally justifiable.⁴ The limits to that idea, already held too broad,⁵ may well be narrowed and defined, as case after case arises. But it will be even more naturally within the competency of the courts to define with strictness the meaning of competition itself. Something has already been done in this way in making it clear that a purpose to put an end to competition is not competition at all. This indeed goes nigh the root of the matter, for most combinations in trade have for their object monopoly.⁶

The last suggestion calls also for a limitation upon the freedom of contract; for having cut down the meaning of

¹ *Ante*, pp. 240, 241, note.

² See the opinion of Lord Brampton in *Quinn v. Leathem*, 1901, A. C. 495; also *Klingel's Pharmacy v. Sharp*, 64 Atl. Rep. 1029 (Md.), that the motive makes the act unlawful.

³ *Pickett v. Walsh*, 192 Mass. 572; *Quinn v. Leathem*, *supra*.

⁴ Mr. Justice Holmes in *Vegelahn v. Guntner*, 167 Mass. 92 (picketing), and in *Plant v. Woods*, 176 Mass. 492, dissenting in both cases.

⁵ In the cases just cited. See also *Berry v. Donovan*, 188 Mass. 353; *London Guarantee Co. v. Horn*, 206 Ill. 493, to the same effect.

⁶ See the strong remarks of Knowlton, C. J., in *Berry v. Donovan*, 188 Mass. 353, 358, 359; also *Klingel's Pharmacy v. Sharp*, 64 Atl. Rep. 1029 (Md.). On the general subject of the text see the *Atlantic Monthly* for December, 1906, 'New National Forces and the Old Law.'

competition it would not do to allow the combination to take refuge in the doctrine of freedom of contract. Having, for instance, declared that the defence of competition does not extend to cases in which the defendants' purpose is to eliminate competition, it would be necessary also to hold that freedom of contract should not extend to the buying out or otherwise absorbing rival interests, with intent to monopolize the business. And all this appears to be perfectly legitimate, for the doctrine of freedom of contract, both in economics and in law, has proved a delusion and has broken down.¹ Legislatures have fully recognized the fact, and the courts are beginning to feel the pressure.

— The meaning of the term 'competition' may also be held not to include the course of business between an employer and his men. The attempt has been made to treat such a matter as competition, on the footing that each side is attempting to obtain as large a share as possible of the income of its efforts.² But the attempt appears to have failed. In a broad sense, it is said, the contending forces might be called competitors, in the sense that competition permits efforts tending to benefit one side at the expense of the other; but that assumes a case of competition already; and where action is directed by one side against the other primarily for the purpose of harm and compelling the other to yield to some demand which cannot lawfully be required, and such action does not directly affect the property, business, or status of the actor, it is not competition.³

Indeed it is plain that the actor in such a case has been driven off his course—that he has left on one side any defence of competition. In that view no limitation of the meaning of competition is involved. But it is also said that in 'the strict sense' the contest between employer and men 'is hardly competition';⁴ and it should seem that the 'strict sense' is the sense to apply, if competition is to be

¹ Centralization and the Law, and the Atlantic Monthly, *ut supra*.

² *Berry v. Donovan*, 188 Mass. 353, 358.

³ *Id.*

⁴ *Id.*

kept from running into monopoly. Competition in industrial pursuits might properly be held to extend only to classes who are bidding for the same thing; for instance, in the case of buying, to buyers whether of commodities or labor, and in the case of selling, to sellers whether of commodities or labor, but not to buyers with sellers. The latter would be a struggle not between competing interests in the ordinary, not to say the strict, sense, but between interests of different kinds, which in reality have different ends in view. The buyer wishes to acquire, the seller to dispose of, something. That 'is hardly competition.'¹

It may a fortiori be held that a relation of contract between an employer and the defendant, by which the defendant merely undertakes to save the employer harmless from liability to men in the employment, or from liability for their misconduct, as in the case of accident and guaranty insurance, does not create a case of competition between the defendant and such men in suits like those under consideration. It is not enough that the interests of both plaintiff and defendant are involved in the contract, and that those interests may become acute in the settlement of demands between the employer and the defendant; at most that is competition only in the broad and rejected sense.²

Suppose however that the defendant rests the justification

¹ *Berry v. Donovan*, 188 Mass. 353, 358.

² *London Guarantee Co. v. Horn*, 206 Ill. 493, *infra*, p. 254, where the case is stated on another point. At p. 501 the court say that, while the interests of the plaintiff and defendant under the contract — a contract by which the defendant was to indemnify the employer against liability for injuries to his men sustained in the employment — 'were involved in the negotiations' for settlement, 'we believe that the authorities which look upon competition as a justification for the act of one party in securing the discharge of an employee have regarded the term in a more restricted sense, and given to the term competition its ordinary meaning and significance.' This was the effect of *Doremus v. Hennessy*, 176 Ill. 608. The criticism of the court in the case quoted is directed to the language of Holmes, J., in *Vegelahn v. Guntner*, 167 Mass. 92, a dissenting opinion much quoted, — an opinion of great logical power but against the direction of economic energy.

of his action upon the very terms of a contract with another, a case which not infrequently arises, as where a trade union has a contract with an employer of labor by which the employer, on request, agrees to discharge men who are objectionable to the union ; is this a good justification ? Having regard to the public pressure towards defeating tendencies to monopoly, the answer is in the negative, and such has been the answer of courts. For example : The defendants are a labor union of shoemakers, having a contract with a certain employer by which the employer agrees not to keep in his employ men who for any cause are objectionable to the union. The plaintiff is a non-union man in the employ of such person, under an engagement terminable at will. The defendants request the employer to discharge the plaintiff on the ground that he was not and would not become a member of the union, and the employer yields, and discharges the plaintiff, to his damage. The contract between the defendants and the employer of the plaintiff is no justification for the act of the defendants.¹

If this doctrine be put upon the ground that good motives can be no justification of the act complained of, the decision is well supported, though there is some authority to the contrary.² On the other hand, courts which sustain the doctrine on the ground that good motives do not help the defendant sustain it only upon the footing that the contract with the plaintiff's employer was invalid.³ 'It may well be,' it has

¹ *Berry v. Donovan*, 188 Mass. 353 ; *Curren v. Galen*, 152 N. Y. 33.

² It is supported on that ground by *Read v. Friendly Soc. of Stonemasons*, 1902, 2 K. B. 88, and by *South Wales Mining Fed. v. Glamorgan Coal Co.*, 1905, A. C. 239, affirming 1903, 2 K. B. 545, C. A., and reversing, 1903, 1 K. B. 118, and opposed by *National Protective Assoc. v. Cumming*, 170 N. Y. 315, four judges to three, and by *Jacobs v. Cohen*, 183 N. Y. 207. These New York cases are opposed in principle to *Curran v. Galen*, 152 N. Y. 33, decided by a unanimous court, though in that case there were threats and malice. See also *Brennan v. United Hatters of North America*, 65 Atl. Rep. 165 (N. J.).

³ *Read v. Friendly Soc. of Stonemasons*, supra ; *Curran v. Galen*, supra ; *Brennan v. United Hatters of North America*, supra.

accordingly been declared, ‘that a person, or many persons acting in concert, would have a right to demand the fulfilment of a contract entered into with him or them, even though such fulfilment involved him who performed it in breaking a contract made by him with another person.’ And it was said that there were ‘many examples,’ the following being one: A man who has affected to sell the same article to two different purchasers could not perform one of the contracts without breaking the other, yet this could not render the purchaser, insisting upon his rights, liable at the suit of the other purchaser.¹

One ground of the invalidity of the contract with the employer was that that contract might be ‘in restraint of trade or otherwise illegal,’² which would be enough to reconcile this case with the doctrine in question, for that doctrine proceeds expressly upon the footing that the defendant’s conduct was of a nature to create a monopoly.³ ‘The attainment of such an object in the struggle with employers would not be competition, but monopoly. . . . In matters of this kind the law does not tolerate monopolies.’⁴ These remarks are made with regard merely to procuring the employer to discharge the plaintiff, without threats or other wrongful acts making it a case of excess. To hold that defendant’s act is accordingly to be justified on the ground that his motives were good, is clearly to pull against the stream.

So much for cases in which the contract set up as justification is invalid, as tending to monopoly. But cases will arise in which the contract relied upon cannot be treated as invalid. In such cases however it will be important to see whether the defendant has in fact acted upon the contract, and that may sometimes be a question of doubt

¹ Darling, J., in *Read v. Friendly Soc. of Stonemasons*, *supra*, at p. 95.

² *Id.*

³ Nothing however is said in *Berry v. Donovan* on the question of the validity of the contract with the employer touching the defendant’s liability.

⁴ Knowlton, C. J., in *Berry v. Donovan*, 188 Mass. 353, 359.

on the terms of the engagement, requiring the courts to construe the same. But it seems that the language of the contract should make it reasonably clear that the defendant has a right in virtue of it to call for the plaintiff's discharge. The courts will not readily find such a meaning. For example: The defendant is a guaranty and accident insurance company, which has promised to indemnify X, proprietor of a bicycle factory, from loss by reason of injuries done to the men of X in their work. The policy of insurance does not require X to discharge any of his men upon request, but does provide that the insurance company may cancel the policy at any time on five days' notice. A disputed case of liability under the policy having arisen touching the plaintiff, who is one of the men of X, the defendants request X to discharge the plaintiff, declaring in language indicating malice that if this is not done at once, the policy will be cancelled. X accordingly discharges the plaintiff, whose engagement is terminable at will, to his damage. But for the defendants' interference X would have continued the plaintiff in his employment. The defendants have not acted upon the terms of the contract of insurance, and are liable.¹

It falls however well within the doctrine which denies justification in these cases, that what the defendant did was done because of the plaintiff's refusal to yield to a request in which the defendant was pecuniarily interested, though the plaintiff was bound to do as requested. For example: The defendants, a labor union, prevent the plaintiff, but without measures in themselves wrongful, from obtaining employment, to his damage, with the object of compelling him to pay a debt which he owes to the union and refuses to pay. The defendants are liable.²

¹ London Guarantee Co. v. Horn, 206 Ill. 493. So also where the defence is based upon articles of association, as in the case of a trade union, of which the plaintiff is a member, if procuring the plaintiff's discharge is not in accordance with the articles, and the plaintiff has not consented to the departure, the defence is bad. Brennan v. United Hatters of North America, 65 Atl. Rep. 165 (N. J.).

² Giblan v. National Laborers' Union, 1903, 2 K. B. 500. A fortiori,

Objection to the plaintiff might however be such as to justify procuring his discharge regardless of any contract between the employer and the defendant. The plaintiff's habits, or conduct, or character, or health might be such as to make it improper or unsafe to associate with him in work.¹

Grounds of
objection to
plaintiff.

§ 5. DAMAGE.

It is not to be urged that as the plaintiff had no right of action against the person who refused to make, or refused to continue, the contract with him, for refusing, he could not have sustained damage in the eye of the law by the act of the defendant in procuring the refusal. The case is analogous to cases of depriving one of a gratuity, such as gratuitous hospitality, heretofore considered.² On the other hand, it appears not to be enough that the defendant intentionally hindered the plaintiff; the question still is, whether the plaintiff has sustained (if he seeks an injunction, is certain to sustain) actual loss by reason of the hindrance. The case is not one of the kind which in this particular calls for drastic measures; the contest is of an even-handed nature, or at the worst with no such kind of danger to the plaintiff as to cause *him* to commit a breach of the peace and so to call upon the courts to treat the wrong as actionable per se. But the damage probably need not be specific, in the sense that it can be measured; the damages would be 'damages at large.' The gist of the action is damage, but if it can properly be inferred from the acts complained of that the plaintiff must have sustained loss from those acts, that is enough. At least so it is laid down of the case of procuring breach of contract,³ the subject of the next chapter.

No legal right
against em-
ployer of
plaintiff.

if the plaintiff was not bound to do as requested. *London Guarantee v. Horn*, 206 Ill. 493; *Brennan v. United Hatters of North America*, 65 Atl. Rep. 165 (N. J.)

¹ *Berry v. Donovan*, at p. 357; *Giblan v. National Laborers' Union*, 1903, 2 K. B. 600, 617.

² *Ante*, p. 14.

³ *Exchange Telegraph Co. v. Gregory*, 1892, 1 Q. B. 147, 153, 156, C. A.

CHAPTER VII.

PROCURING BREACH OF CONTRACT.

Statement of the duty. A, having knowledge or notice of the existence of a contract between B and C, owes the duty to B not to procure C to break his contract, to B's damage.

It should be remembered that cases of this kind, though nominally cases of malice, are not such in reality. The knowledge or notice of the relation, called 'malice,' is only a necessary part of the breach of duty complained of in the sense that danger must be observed or observable (in ordinary cases) to create liability.¹ Proof of malice in any proper sense of the term is not necessary.²

How far the plaintiff's side of the matter, in the making a *prima facie* case, is due to the struggle between social forces of the present day, referred to at the beginning of Chapter VI., is not clear; but the defendant's side, in the limitation of competition, has plainly been affected by that struggle.

From very early times it has been actionable by the common law of England for one to entice away another's servants, *Enticing servants away:* with notice of the employment; though the term *extension of idea of service.* 'servant' at first was used to designate a person employed in menial service,³ that is, one living

¹ *Ante*, p. 27.

² *Allen v. Flood*, 1898, A. C. 1, 121-123, 154.

³ The term was not applied to the master's children, though they were and are in law his servants, of his household. See *Taylor v. Neri*, *infra*. The secondary meaning of 'menial' became the common meaning long ago.

In early times of English vassalage a man's menial servants were so much part of his own station in life, or status, that merely to entice them away appears to have been actionable. Comp. L. C. *Torts*, 227, 290,

with the master as a member of his household or family. But that was because there was then little if any service that was not of that kind.¹ When in process of time there came to be much service in which the servants were not members of the master's household, the rule was extended accordingly, and deemed to apply to all cases in which the relation of master and servant existed; though not without question.² The extension of the rule is now well settled. Indeed the whole subject appears to be only a special phase of the general doctrine of the right of action for procuring breach of contract, as will be shown in what follows.

§ 1. WHAT MUST BE PROVED.

In the case of contracts for service the plaintiff has to prove the enticement from service, with notice, to his damage. Such evidence will entitle him to recover. For example: The defendant entices away from the plaintiff's employment the plaintiff's journeymen shoemakers, working by the piece

291. Secus of his children, until still earlier times of serfdom. *Taylor v. Neri*, *infra*. But to seduce his daughter was trespass until the nineteenth century.

¹ The Statute of Labourers of 25 Edw. 3, stat. 1, may be noticed. The statute grew out of the scarcity of laborers caused by the plague, and accordingly related to ploughmen and others doing menial service. This has sometimes been supposed to be the origin of the master's right against third persons, but that appears to be a mistake. The statute was repealed, but the master's right of action has continued, without legislation, to this day. The Statute of Labourers simply added to the law certain provisions not of the common law, as in regard to harboring servants. See *Lumley v. Gye*, 2 El. & B. 216; L. C. Torts, 306, Wightman, J.

² See *Ashley v. Harrison*, 1 Peake, 194; s. c. 1 Esp. 48; *Taylor v. Neri*, 1 Esp. 386. In the second case, an action for assaulting an opera singer whereby the plaintiff lost his service, *Eyre*, C. J., said that he did not think the law extended beyond menial servants, and pointed out that a father could not maintain an action for merely enticing away of his daughter per quod servitium amisit. But it is now well settled that the rule is not confined to the case of menial servants. See *Lumley v. Gye*, 2 El. & B. 216; L. C. Torts, 306, Crompton, J.

and not 'menial' servants, with notice of their relation to the plaintiff, to the plaintiff's damage. The defendant is liable.¹ Again: The defendant entices away from the plaintiff's employment, with notice thereof, the plaintiff's piano workmen, working by the piece and not being menial servants, to the plaintiff's damage. The defendant is liable.² Again: The defendant entices away the plaintiffs' workmen, engaged generally and not by the piece, or as journeymen, or as menial servants, in the manufacture of boots and shoes, with notice of the employment, to the plaintiffs' damage. The defendant is liable.³

It matters not in cases of binding engagement to service that the servant had not yet entered upon performance of the Performance of service at the time of the interruption of the engagement. If by the terms of the contract the contract not begun.

master has a right to require performance of the service at the time of the act of the defendant, he has a right of action. For example: The defendant induces the plaintiff's gardener to refuse to carry out his engagement to make the plaintiff's gardens, though because of dissatisfaction with his engagement the gardener has already absented himself for a considerable time from his duties under the engagement. The defendant is liable.⁴

In the foregoing cases the defendant had notice of the existence of the relation of master and servant when he procured

¹ *Hart v. Aldridge*, 1 Cowp. 54, a case often followed.

² *Gunter v. Astor*, 4 J. B. Moore, 12.

³ *Walker v. Cronin*, 107 Mass. 555.

The allegation of malice, and with unlawful purpose to injure the plaintiff in his business, has been omitted from the foregoing statement as surplusage, the malice and the unlawful purpose being found in doing the act with notice of the relation. See *ante*, p. 27. 'It must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant,' etc. Crompton, J., in *Lumley v. Gye*. 2 El. & B. 216, *Quinn v. Leathem*, 1901, A. C. 495; *South Wales Miners' Fed. v. Glamorgan Coal Co.*, 1905, A. C. 239.

⁴ Compare *Lumley v. Gye*, 2 El. & B. 216.

the servant to leave his master. Notice of the existence of that relation is necessary in all cases of actual service ; but it matters not that the defendant had no notice at first of the existence of the relation ; if he afterwards acquire notice and then persist in keeping the servant away from his master, he will be liable from the time of the notice. For example : The defendant employs the plaintiff's servant, upon application by the servant ; the servant having left the plaintiff during the existence of his contract of service, of which fact however the defendant is ignorant. Afterwards the plaintiff informs the defendant that the person employed by him is the plaintiff's servant. The plaintiff requests the servant to return to him, the servant refuses, and the defendant continues to keep the servant in his employ. The defendant is liable for continuing the servant in his service after the notice, but not for employing the servant.¹

In order however to maintain an action for preventing a renewal of the service, technically called 'harboring' the servant, and not for interrupting it, there must have been a binding contract of service ; for in such a case the plaintiff cannot require the service, nor is he in the enjoyment of it as a gratuity. For example : The defendant receives, without notice, a person who has been acting in the service of the plaintiff under a contract not enforceable (under the Statute of Frauds), and afterwards, on notice of the plaintiff's claim to the service, during the term of service as agreed upon, refuses to send the person away. The defendant is not liable.²

§ 2. GRATUITOUS SERVICE.

It was formerly matter of some doubt whether an action could be maintained for interrupting, with notice, the gra-

¹ *Blake v. Lanyon*, 6 T. R. 221.

² *Sykes v. Dixon*, 9 Ad. & E. 693. See also *Hartley v. Cummings*, 5 C. B. 247; *Pilkington v. Scott*, 15 M. & W. 657.

tuitous relation of master and servant. It was sometimes supposed that inasmuch as the master could not require the service, he had no right to it which could be infringed. But this view does not now obtain.

Though a person may not be able to require a gratuity he has a right to it when it is given and as it is being received, and no one may lawfully interrupt his actual enjoyment of it. Hence if a person be actually engaged in giving his services to another without reward, any one who with notice interrupts the service becomes liable for any damage sustained. For example: The defendant, with notice, entices away a young woman while she is in the gratuitous service of the plaintiff and thereby deprives the plaintiff of the benefit of her help, to his damage. The plaintiff is entitled to recover.¹

Indeed it matters not in such cases that the person enticed away was actually under engagement with another; if the latter does not insist upon his rights, no third person can set up such rights to escape liability for his own misconduct. For example: The defendant, with notice, seduces a married woman while she is rendering gratuitous service to the plaintiff, her father. The defendant is liable and cannot set up in defence the paramount right of the woman's husband to her help.²

As was observed however in the preceding section, and as follows from what has been said in the present, no action can be maintained for mere harboring a servant serving gratuitously, though with notice. The action lies solely for enticing the person away or otherwise interrupting the performance of the service while the servant is giving it. When the servant has put an end to the relation, the right to the gratuity at once terminates.

So much for any peculiarity there may be supposed to be in the relation of master and servant. Assuming that subject to be no more than a special phase of contract relation in

¹ *Evans v. Walton*, L. R. 2 C. P. 615. The young woman was the plaintiff's daughter, but she was of age.

² *Harper v. Luffkin*, 7 B. & C. 387.

general, what the plaintiff, broadly, has to prove in cases under the title of the present chapter, is, notice of the contract relation, breach of the same intentionally caused by the defendant, and actual damage sustained; that is, so far as the case may turn upon procuring breach of contract. But the question now arises whether there is any such broad doctrine.

3. CONTRACT IN GENERAL.

After great discussion, it was held in England in 1853 that the master's right in cases like the foregoing is only an example and not an anomalous or exceptional case; a majority of the Queen's Bench laying down the rule, as new only in the sense that it was then clearly and definitely stated, that to procure a man to break his contract, with notice of the existence of the same, is actionable if the plaintiff, the other party to the contract, suffered harm.¹ For example: The plaintiff's declaration alleges that the plaintiff, being proprietor of a theatre in London, made a contract with an opera singer, one Miss Wagner, whereby she agreed to sing exclusively at the plaintiff's theatre during a certain season; and that the defendant, proprietor of a rival theatre there, knowing the premises, persuaded and induced Miss Wagner to break her contract with the plaintiff, and to refuse to sing at his theatre, to the damage of the plaintiff. The declaration is good.²

In the example the court held that it made no difference whether the party induced to break the contract had already begun performance or not. And the whole decision has been reaffirmed and the question set at

Master's
right deemed
only an ex-
ample: larger
view.

Performance
not begun.

¹ *Lumley v. Gye*, 2 El. & B. 216; *Bowen v. Hall*, 6 Q. B. Div. 333; *Quinn v. Leathem*, 1901, A. C. 495.

² *Lumley v. Gye*, supra, Coleridge, J., dissenting in an elaborate opinion, holding that the action for procuring breach of contract of service was founded upon the Statute of Labourers, and confined therefore to cases of the relation of master and servant in the ordinary sense.

rest in England;¹ and the doctrine has been followed or approved,² though also denied, in America.³

Several objections have been raised besides the one that there was no action for procuring breach of contract, except Objection : by a master, before the Statute of Labourers of the remoteness. middle of the fourteenth century. One of these objections is that the defendant's act is too remote for accountability,— that the defendant cannot be liable for the free, voluntary misconduct of another not acting as his agent or servant. ‘The action is not maintainable, as the breaking her contract was the spontaneous act of Miss Wagner herself, who was under no obligation to yield to the persuasion or procurement of the defendant.’⁴ In other words, the *damnum* was not the natural or legal consequence of the *injuria*.

To this objection the answer appears to be, that even if Miss Wagner's act was not likely to result from the defendant's persuasion, the defendant at all events intended that it *should* result, and it did.⁵ A may be liable for successfully persuading B to commit a crime or a tort, however improbable

¹ *Bowen v. Hall*, 6 Q. B. Div. 333; *South Wales Miners' Fed. v. Glamorgan Coal Co.*, 1905, A. C. 239; *Quinn v. Leathem*, 1901, A. C. 495; *Read v. Friendly Soc. of Stonemasons*, 1902, 2 K. B. 730, C. A.

² *Beekman v. Marsters*, 194 Mass.; *Walker v. Cronin*, 107 Mass. 555; *Angle v. Chicago & St. Paul Ry.*, 151 U. S. 1, 13, 14. See *Rice v. Albee*, 164 Mass. 88; *May v. Wood*, 172 Mass. 11.

³ *Boyson v. Thorn*, 98 Calif. 578; *Rice v. Albee*, 164 Mass. 88; *May v. Wood*, 172 Mass. 11; *Chambers v. Baldwin*, 15 S. W. Rep. 57 (Ky.); *Boulier v. Macauley*, id. 60 (Ky.). *May v. Wood* is the converse of the cases of the master's right, being a suit by a servant for procuring the master to break his contract with her and discharge her. A majority of the court held that there was no such converse right of action, unless wrongful means were used. But *Rice v. Albee* and *May v. Wood* have been discredited by *Berry v. Donovan*, 188 Mass. 353, *Pickett v. Walsh*, 192 Mass. 572, and *Beekman v. Marsters*, 194 Mass., in the clearer stage of social movement. But they are interesting cases, standing as they are at the parting of the ways — uncertain of the real effect of the movement going on and so clinging to the past.

⁴ *Wightman*, J., in *Lumley v. Gye*, *ut supra*.

⁵ *Bowen v. Hall*, 6 Q. B. Div. 333, 338; *Quinn v. Leathem*, 1901, A. C. 495, 535.

it may be that B will yield to the persuasion.¹ Intention to have an act done, and procuring it to be done though by persuading another to do it, should bring a man near enough to the act to make him accountable for it; successful endeavor ought to be enough. The fact that the immediate actor is a free agent, under no obligation to be persuaded, should not affect the case. It is settled law that the fact that intervening instruments are human beings, acting of their own will, does not necessarily cut off liability from one back of them.² But more directly to the point, a husband can maintain an action against one who induces his wife, without legal cause, to leave him,³ and conversely a wife can maintain an action against one who similarly persuades her husband to abandon her;⁴ and yet the leaving or abandonment is the 'spontaneous' act of the wife or husband, in the same sense in which Miss Wagner's act was spontaneous.

The other objection is, that the only duty bearing upon the case is the duty created by the contract.⁵ It makes no difference, according to this objection, that the defendant was near enough to cause and did cause the breach of contract, since he violated no duty to the plaintiff; only the party who broke the contract violated such a duty. This objection is at first more serious, or rather it is more subtle. It does not go the length of denying that the defendant owed *any* duty to the plaintiff. It does

Objection :
duty one of
contract only.

¹ 'He who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.' Erle, J., in *Lumley v. Gye*, *supra*.

² *Thomas v. Winchester*, 6 N. Y. 397; *Knelling v. Lean Manuf. Co.*, 183 N. Y. 78; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Derry v. Flitner*, 118 Mass. 131; *Lechman v. Hooper*, 52 N. J. 253; *Lewis v. Terry*, 111 Calif. 39; *Woodward v. Miller*, 119 Ga. 618.

³ *Winsmore v. Greenbank*, Willes, 577; *Lumley v. Gye*, per Wightman, J. See post, pp. 277-280.

⁴ See the chapter on Seduction, post.

⁵ *Boyson v. Thorn*, 98 Calif. 578, which treats the relation of master and servant as exceptional, as does *May v. Wood*, 172 Mass. 11, *supra*, p. 262, note 3.

not deny, and no one would deny, that the defendant owes to the plaintiff in such a case the duty to use no *wrongful means* to procure the breach;¹ it only denies that inducing one, by persuasion merely, to break one's contract is wrongful.

Analogy is clearly in favor of treating persuasion to break a contract as too dangerous to the public welfare to be permitted. The well-established case of the right of action of a husband or wife against a third person for persuading the other party to the marriage contract to break the same by abandoning the other, if a stronger case, is still not without its force as a precedent. And the same may be said of the case of persuading another to commit a crime or a tort, for the person persuaded may have owed a duty of contract, as of faithfulness in a foreign agency, of which the offence is a breach purposely caused by the defendant. But what difference can it make whether the duty violated by the person persuaded is one of contract or of another kind? Why should there not be a legal duty not to persuade a man to break his contract as well as not to persuade a man to violate his duty to the State or any other binding duty? Has the supposed distinction anything more to rest upon than the confused notion that a right in *personam* is inconsistent with a right in *rem*?² But whatever may be said on analogy or on other lines, the question has been settled by the better authorities, in the struggle of the last few years, on broad lines of liability.³

¹ Note that the objection in no way questions the idea that the creation of a right in *personam* may incidentally or necessarily generate a right in *rem*.

² That there is no such inconsistency in reality is shown by the fact that to procure breach of contract by means admitted to be of a wrongful nature, such as misrepresentation, is unlawful (if actual damage result). It is everywhere agreed that a right in *personam* may generate a right in *rem*. See *ante*, p. 12.

³ *Exchange Telegraph Co. v. Gregory*, 1896, 1 Q. B. 147 (C. A.); *South Wales Miners' Fed. v. Glamorgan Coal Co.*, 1905, A. C. 239; *Walker v. Cronin*, 107 Mass. 555; *Berry v. Donovan*, 188 Mass. 353; *Beekman v. Marsters*, 194 Mass.; *Jones v. Stanley*, 76 N. Car. 355; *Angle v. Chicago & St. Paul Ry.*, 151 U. S. 1, 13, 14.

Assuming that the right in question exists, will it affect the case that the contract was not enforceable, as for instance because of the Statute of Frauds? Has the plaintiff still a legal right towards the defendant? In cases in which wrongful means have been employed, as where the procuring was by misrepresentation,¹ or by seduction, or by enticing away servants,² the courts have held that it makes no difference that the contract was not binding. Such cases have been put upon the ground that the plaintiff has a right to any service which another is willing to give, whether for pay or gratuitously; which accords with what we have already seen touching the nature of legal right.³ That a *defence* based on alleged right arising by contract cannot be allowed where the contract is invalid,⁴ appears to have no bearing on the case, for the plaintiff may have a legal right regardless of contract; and wherever he has such a right, it is plain that the defendant is liable if he hinders the plaintiff in his exercise of it, in terms of liability laid down in the preceding chapter.

§ 4. DEFENCE OF LEGAL RIGHT: COMPETITION.

The same questions discussed in Chapter VI. may arise in cases of procuring breach of contract. Here however competition is no defence. For example: The defendant, with knowledge of the existence of a valid contract between the plaintiff and X, proprietor of a hotel, by which contract the plaintiff has exclusive authority throughout certain States to secure and send guests to X's hotel, procures X, but without malice or unlawful means, to break his contract with the plaintiff and employ him also, the defendant, for the same pur-

¹ Benton *v.* Pratt, 2 Wend. 385; Rice *v.* Manley, 66 N. Y. 82.

² Evans *v.* Walton, L. R. 2 C. P. 15 (distinguishing Cox *v.* Muncey, 6 C. B. n. s. 375, and Sykes *v.* Dixon, 9 Ad. & E. 693); Harper *v.* Suffkin, 7 Barn. & C. 387; Fitzh. N. B. 91 G, note by Lord Holt; Sutton *v.* Huffman, 3 Vroom, 58; Lipe *v.* Eisenlard, 32 N. Y. 229; Bigelow's L. C. Torts, 292-304.

³ Ante, p. 14.

⁴ Ante, pp. 252, 253.

pose and in the same territory, to the damage of the plaintiff. This is a breach of duty to the plaintiff; competition being no justification or defence to procuring breach of contract.¹

This appears to mean that competition rises no higher than permissive right.²

§ 5. DAMAGE.

It is not enough that there has been a breach of contract, though that would of course be enough for an action against the party who had broken the same. For the purpose of an action against a stranger to the contract for procuring the breach, actual damage must be proved. It is not necessary however that there should have been an engagement for a fixed period of time, such as 'for the season;' the action lies as well where no time is fixed, or where the engagement is from day to day, or by the piece.³ Indeed it has lately been held that specific damage need not be shown in cases in which it appears that some damage, however undefined, must have been sustained;⁴ which however is in accord with the legal idea of special damage.⁵

¹ *Beekman v. Marsters*, 194 Mass. (injunction). Secus as to liability, if the other party to the contract, and not the defendant, caused the breach. 'To charge the defendant,' under ordinary methods of promoting and increasing his own business, resulting in breach of contract, 'the plaintiff must prove that it was the act of the defendant which brought about the breach of the contract with the plaintiff.' *Id.*, Loring, J.

² *Ante*, pp. 3, 13, 14, 24-30.

³ *Gunter v. Astor*, 4 J. B. Moore, 12; *Hart v. Aldridge*, 1 Cowp. 55; *Lumley v. Gye*, 2 El. & B. 216; s. c. L. C. Torts, 306, 316; *Walker v. Cronin*, 107 Mass. 555.

⁴ *Exchange Telegraph Co. v. Gregory*, 1896, 1 Q. B. 147, C. A.

⁵ *Ratcliffe v. Evans*, 1892, 2 Q. B. 524, 528, Bowen, L. J.

CHAPTER VIII.

SEDUCTION.

Statement of the duty. A owes to B the duty not to seduce B's female child and servant,¹ capable of service, or B's female ward and servant, capable of service, towards whom B stands in loco parentis, or to entice away or alienate the affections of B's wife or husband.

The term 'seduction,' in its broad legal sense, includes the enticing away of servants and enticing away or alienating the affections of a husband or a wife; hence the use of the single word to cover all that is contained in the 'Statement of the duty.' The subject of enticing servants away has been disposed of in the two next preceding chapters; what is left for the present chapter is seduction in the more common sense, including alienation of affection in the marital relation.

The subject of seduction stands aside from the general current of social movement of the present time, but it shows clear signs of the effect of past social changes. Seduction in the common law of former times is based entirely on the relation of master and servant. The law was the expression of that earlier social era when the children of people of the working class *were* the servants of the head of the family; the working class did not make the law,—they were not strong enough,—and those who did make it considered it enough to protect the head of the family from loss of service — how he was deprived of this was a matter of small importance.

¹ This was trespass formerly. See Chitty, Pleading, ii. 643, note.

And so disgrace was at most only aggravation of damages, if provable at all.

The higher classes would not be apt to call upon the law ; it was better to hush the matter up. But when, in the nineteenth century, the middle class appeared, it was a matter of social pressure that the old view should be modified. In England, and in many of our States, that view still obtains as a sort of fictitious theory ; while in other States — the newer States especially — the old idea has become completely reversed, the disgrace being regarded the essential feature of the wrong and loss of service only aggravation ; this generally under statute.

§ 1. ENTICING AWAY CHILDREN.

It is doubtful whether any action lies by a parent for the mere enticing away of his minor daughter (or son), or for harboring the child after notice that the departure Parent's right of action : loss of service. is without the parent's consent.¹ There must be either a real loss of service, or a loss of service by way of seduction ; in the first case the ordinary relation of master and servant, already disposed of, exists between the parent and child ; the second case is the subject now reached for consideration.

§ 2. SEDUCTION STRICTO SENSU: PARENT AND CHILD : WHAT MUST BE PROVED, ETC.

A parent's right of action against one who has seduced or enticed away his child is at common law the right of action of

¹ Taylor *v.* Neri, 1 Esp. 386 (referred to by Crompton, J., in Lumley *v.* Gye, 2 El. & B. 216, and L. C. Torts, 306), where Eyre, C. J., said that if a daughter left her father's service no action for loss of service could be maintained. His lordship apparently meant, against one who enticed the daughter away ; but even if he meant against the daughter the result would be the same, for if the daughter was not liable the enticing away would not be wrongful unless the daughter was giving real service gratuitously. Qu. as to civil liability for kidnapping the plaintiff's young child ?

a master,¹ that is, it turns upon the existence of the relation of master and servant, not merely upon parental authority or kinship.² The plaintiff need not prove notice of the relation of master and servant between himself and the child,³ but must prove the performance of some service, however slight, by the child accordingly, and the seduction. The right of action lasts as long as that relation lasts; it does not terminate necessarily when the child becomes of age.⁴ The relation of parent and child, where the child is under age, appears to raise a *prima facie* right of action in the parent.

Master and
servant as
ground of the
right.

Seduction of course is not necessary to the right of action of a parent for a loss of service, but as a matter of fact the allegation of seduction is usually the basis of the cause of action in the case of a daughter. And that must then be proved if the plaintiff seeks recovery for consequences peculiar to seduction,—disgrace to the family; though in a suit for loss of service by rape, if a civil action should be brought, disgrace would no doubt be a large element in the damages. The distinction between seduction and rape becomes more important on the question of the right of action of the daughter; in the former case consent bars her suit; in the latter case there is of course no consent.⁵ The question whether the

¹ The rule has in effect been changed by statute in Kansas. *Anthony v. Norton*, 60 Kans. 341, reviewing the cases. So perhaps elsewhere by ‘reformed procedure.’

² *Middleton v. Nichols*, 62 N. J. 636, 637.

³ *Chitty, Pleading*, ii. 642, note. See *Allen v. Flood*, 1898, A. C. 1, 154. The defendant may be bound to know whether she was of age or not. If not of age, she would presumptively be in the father’s service, it seems. Seduction of a young child should be a presumptive wrong to the father.

⁴ *Infra*, p. 272.

⁵ See on the distinction, *White v. Murtland*, 71 Ill. 250; *Marshall v. Taylor*, 98 Calif. 55; *Robinson v. Powers*, 129 Ind. 480; *Hood v. Studderth*, 111 N. Car. 215; *Bradshaw v. Jones*, 103 Tenn. 331; *State v. Bierce*, 27 Conn. 319; *Carlisle v. State*, 73 Miss. 387; *State v. Marshall*, 137 Mo. 463.

daughter did consent is often a difficult one,¹ unless it is a question of her age where statute fixes the age of consent.² Of course the child's consent cannot bar the parent's action, which is, the usual action for seduction.³ The difference between seduction and rape in a suit by the parent is mainly a question of damages; though in either case the bad behavior of the daughter would have a legal bearing on the question.⁴

In England the parent's right of action terminates whenever the child leaves the parent's house with intention not to return.⁵ That rule does not obtain in this coun-

**Absence of
child from
parent : will
of child.** try.⁶ The father's right of action here does not depend upon the will of the child; notwithstanding

ing the child's absence from her father's house at the time of the seduction, though she intends not to return, the father's right of action is not affected. This is true though she was at the time in the service of another with her father's consent. For example: The defendant seduces the plaintiff's daughter under the following circumstances: The daughter, at the age of nineteen, goes, with the consent of her father the plaintiff, to live with a relative, for whom she works when she pleases, receiving pay for her labor. While there, and still under age, she is seduced and got with child by the defendant, and returns to her father and is cared for. She had no intention, but for the seduction, to return. The defendant is liable.⁷

That however is the extent of the American rule. If the power of the parent over the child was gone at the time of the seduction, whether by his own act or by act of the law,

¹ See for instance *Hawn v. Banghart*, 76 Iowa, 683, on 'artifice'; *Johnson v. Holliday*, 79 Ind. 151.

² See *White v. Murtland*, supra, suit by the father for what the evidence indicated to be rape upon his daughter, fourteen years of age.

³ *Id.*

⁴ *Id.*

⁵ *Dean v. Peel*, 5 East, 45. See *Griffiths v. Teetgen*, 15 C. B. 344; *Manley v. Field*, 7 C. B. n. s. 96; *Hedges v. Tagg*, L. R. 7 Ex. 283.

⁶ *Middleton v. Nichols*, supra; *Milliken v. Long*, 188 Penn. St. 411; *White v. Murtland*, 71 Ill. 250.

⁷ *Martin v. Payne*, 9 Johns. 387; s. c. L. C. Torts, 286.

the seducer has violated no legal duty to him;¹ though there has been some conflict of authority in regard to the application of this doctrine to the case of a return of the daughter after the seduction, a point to be referred to later.

It is considered however that, if the parent's control over his child was divested by fraud, he may treat it, on discovering the fraud, as never having been abandoned, and maintain an action against the seducer. For example: The defendant hires the plaintiff's daughter from his service with intent to seduce her, and by this means obtains possession of her person, and seduces her. The plaintiff is entitled to recover as if the daughter had been seduced while in his own service.²

Control of
parent taken
away by
fraud.

Apart from statute, there must have been ability to render service at the time of the seduction;³ though whether actual services were being rendered or not, or what the extent or value of the services, has nothing to do with the right of action,⁴ and in many cases may have little if anything to do with the amount recoverable. Loss of service is indeed of the gist of the action, by the common law; but when ability to perform service has been shown, damages may be given not merely for any actual loss of service but also for the disgrace inflicted upon the plaintiff and his family,⁵ the amount which may be given varying more or less with the station in life of both parties and being subject to the reasonable judgment of the jury.⁶

Ability to
serve.

The father's right of action continues, as has already been

¹ Middleton *v.* Nichols, 62 N. J. 636, 638.

² Speight *v.* Oliviera, 2 Stark. 493; Dain *v.* Wycoff, 7 N. Y. 191, 194.

³ Hall *v.* Hollander, 4 B. & C. 660.

⁴ See Grinnell *v.* Wells, 7 Man. & G. 1044, note to the case.

⁵ Terry *v.* Hutchinson, L. R. 3 Q. B. 599; Bartley *v.* Richtmyer, 4 Comst. 38; L. C. Torts, 294.

⁶ White *v.* Murtland, 71 Ill. 250. The only limit upon their action as to the amount, as in many other cases, is that it must not be excessive, under all the facts of the case taken together, having in view the extent of the injury. Id.

intimated, after the daughter has come of age, if the relation of master and servant is still in operation between them. If the parent continue to exercise authority over the daughter Daughter of after her majority, and she continue to submit, age. she is still his servant, though not under an actual engagement to serve him; and seduction under such circumstances is a breach of legal duty to the parent. For example: The defendant seduces the plaintiff's daughter, aged twenty-two years. Prior to and at the time of the seduction, the daughter has been living part of the time with her brother, who resides about a mile from her father's house, and part of the time with her father. She has not received wages from her brother, and when at home has worked for her mother, the plaintiff buying her clothing. The daughter is the plaintiff's servant, and the defendant is liable.¹

It has been held in England that the seduction should be followed by pregnancy or disease to entitle the plaintiff to Pregnancy or recover.² The American rule is, that where the disease. proper effect of the connection is an incapacity to labor, by reason of which the plaintiff loses the services of his daughter and servant, the loss of such services entitles the plaintiff to recover against the seducer. The same principle which gives a master an action where the connection causes pregnancy applies to the case of sexual disease, and, indeed, to all cases where the proper consequence of the act of the defendant is a loss of health resulting in an incapacity for such service as could have been rendered before. For example: The defendant seduces the plaintiff's minor daughter, by reason of which, without becoming pregnant (or being affected with sexual disease), she suffers general injury in health, so that it becomes necessary for the plaintiff to send her away

¹ Sutton *v.* Huffman, 3 Vroom, 58; Rist *v.* Faux, 4 Best & S. 409 (Ex. Ch.); Evans *v.* Walton, L. R. 2 C. P. 615. See ante, p. 269.

² Eager *v.* Grimwood, 1 Ex. 61. But see Evans *v.* Walton, L. R. 2 C. P. 615, 617.

for her recovery; whereby he incurs expense and loses his daughter's services. The defendant is liable.¹

If however the loss of health be caused by mental suffering not the necessary effect of the seduction, especially if produced by subsequent causes, the loss of service is not the effect, in contemplation of law, of the defendant's act; and hence the action cannot be maintained. Loss of health
due to mental
suffering.

For example: The defendant seduces the plaintiff's minor daughter, and subsequently abandons her, in consequence of which she suffers such distress of mind as to bring illness upon her, and incapacitate her for performing services for the plaintiff; no pregnancy or disease resulting by direct consequence of the seduction. The defendant is not liable to the plaintiff.²

If a loss of service follow as the proper effect of the defendant's act, it is held to be immaterial, so far, that he accomplished his purpose without resorting to seductive arts. The willingness of the daughter cannot affect the parent's right of action for loss of service;³ though the ready consent of the young woman might be ground for mitigation of other damages,⁴ especially if she was notoriously a loose character.

What has been said in the preceding paragraphs concerning the parent's right of action for loss of service must be understood of the father's claim to damages. During his guardianship of the daughter, the right of action belongs to him alone. Should he be removed by the law from

¹ *Abrahams v. Kidney*, 104 Mass. 222; *Boyle v. Brandon*, 13 M. & W. 738.

² *Boyle v. Brandon*, *supra*; *Abrahams v. Kidney*, *supra*. See *ante*, p. 62.

³ *Damon v. Moore*, 5 Lans. 454. See *Broadhurst v. Jones*, 103 Tenn. 331.

⁴ *Hogan v. Cregan*, 6 Rob. 138 (N. Y.), criticised in *Damon v. Moore*, *supra*. Compare *Winter v. Henn*, 4 Car. & P. 494, and *Forster v. Forster*, 33 L. J. Prob. & M. 150, n., as to criminal conversation.

his natural position of authority, or should he die during the child's minority, the question arises of the mother's right of action against the seducer. It is clear if the guardianship of the child has been given to her, she has a right of action for the loss of service; though it may be doubted if at the present time the mere relation of guardian, apart from that of parent, would, in all cases, afford a right of action for the child's seduction, a point to be further adverted to in the next section.

A difficulty arises where the mother, upon the death of the father, or his removal from the guardianship, simply continues to exercise authority over her daughter, and to receive her (voluntary) obedience, without having received an appointment as guardian. The mother's right of action has sometimes been supposed to turn upon the question of her right to require the child's support in such a case. It is now well settled in America however that so long as the daughter continues to give obedience and service to her mother, the latter has a right of action for a wrongful interruption of the daughter's position of servant.¹ For example: The defendant seduces the minor daughter of the plaintiff, a widow. The daughter, having previously been in the service of the defendant, and then in the service of D, returns from the latter person to her mother to aid her during sickness in the family. While thus with her mother for a day or two, she is got with child by the defendant. The defendant has violated a legal duty to the plaintiff, and is liable in damages.²

The authority from which this example has been given went one step further, and decided that the mother's right of action was not affected by the fact that the daughter, when seduced, was actually in the service of another, so long as she

¹ *Gray v. Durland*, 51 N. Y. 424; *Furman v. Van Sise*, 56 N. Y. 435; *Heaps v. Dunham*, 95 Ill. 583; *Ellington v. Ellington*, 47 Miss. 329.

² *Gray v. Durland*, 51 N. Y. 424. In *Abrahams v. Kidney*, 104 Mass. 222, the mother sued and recovered.

indicated a willingness to consider her mother as still entitled to her assistance.

There is conflict of American authority concerning the mother's right of action in such cases where the daughter, seduced while out at service, returns to her mother, and is supported and cared for during her sickness. The doubt is in regard to the mother's relation to her daughter apart from any interference of the law in giving custody to her. Unless the mother is considered to have the legal right to require her daughter's service, it is difficult to see how she could be entitled to sue for the seduction in a case of that kind.¹

The child is not entitled, apart from statute,² to sue for her own seduction, since she has consented to the act; though if the seduction was effected under a promise of marriage, which is afterwards broken, she may recover damages for the seduction. But the action is then for the breach of promise of marriage, and not for the seduction. For like reason the parent is barred if he consented or virtually consented to the act. For example: The defendant is permitted by the plaintiff to visit his daughter as a suitor, after notice that he is a married man and a libertine; the defendant, on inquiry by the plaintiff as to this matter, representing that

¹ The mother's right of action in such cases is denied in *South v. Deniston*, 2 Watts, 474; *Roberts v. Connelly*, 14 Ala. 235. To the same general effect, *Freto v. Brown*, 4 Mass. 675; *Worcester v. Marchant*, 14 Pick. 510. It is supported in *Sargent v. ——*, 5 Cowen, 106. It is obvious that the rules of law as to cases like those stated must remain in uncertainty and conflict until the nature of the mother's authority is definitely settled. It is still more doubtful whether the mother of a daughter not born in lawful wedlock could maintain an action in a case like that of the text. The mother would not be even guardian for nurture in such a case. See *Regina v. Clarke*, 7 El. & B. 186; *In re Ullee*, 53 L. T. N. s. 711, affirmed 54 L. T. N. s. 286, Ch. Div. But statutes concerning the mother's rights are coming into existence in various States.

² But statutes in some States give the daughter a right of action for real seduction, notwithstanding her consent. See *Hawn v. Banghart*, 76 Iowa, 683, 14 Am. St. Rep. 261. Of course if the daughter was incapable from tender years or imbecility to consent, she may sue. *Delver v. Boardman*, 20 Iowa, 446.

his wife is an abandoned character, and that he will soon obtain a divorce from her, and then marry the plaintiff's daughter. The defendant afterwards, while continuing his visits at the plaintiff's house, seduces the young woman. The plaintiff is deemed not entitled to recover for the seduction.¹

§ 3. GUARDIAN AND WARD: WHAT MUST BE PROVED, ETC.

Not only the parent, but any one standing as guardian, in loco parentis, and receiving, to his own benefit, the services of a child, can maintain an action for loss of service on proof that the defendant has interrupted the same and deprived the plaintiff of the benefit of the service, however slight. For example: The defendant seduces the plaintiff's niece, the parents of the young woman being dead, and the plaintiff standing towards her in loco parentis. The defendant is liable, though the young woman has property left her by her parents, and performs but slight service for the plaintiff.²

The right of action in all such cases, and in cases strictly of guardian and ward, depends, it seems, upon the fact that the guardian or person standing in loco parentis is receiving the services (however slight) to his own benefit. If the guardian has merely the supervision of the ward and her income, while she lives elsewhere, or performs service for herself, the guardian simply receiving her wages and acting as her trustee, it is improbable that he can sue for her seduction.³

¹ Reddie *v.* Scoolt, Peake, 240. Compare cases of criminal conversation, post, p. 281.

² Manvell *v.* Thomson, 2 Car. & P. 303. And, as in the case of an action by the father, damages may be given beyond the value of the services. Irwin *v.* Dearman, 11 East, 23. It is not necessary, it seems, to prove knowledge of the guardianship. Compare Chitty, Pleading, ii. 642, note.

³ In early times the ward was the guardian's chattel. Lumley *v.* Gye, 2 El. & B. 216, 250, 257.

On the whole, the chief difference between the ordinary case of master and servant on the one hand, and that of parent and child and guardian and ward on the other, appears to be that in the former case the services must be substantial, and the damages would probably be confined to actual loss suffered ; whilst in the other two cases the services may be nominal, such as might be presumed where persons so related live together.¹

§ 4. HUSBAND AND WIFE: WHAT MUST BE PROVED, ETC.

To entice away, or alienate the affections of, one's wife, though without knowledge of the existence of the marital relation,² is a civil wrong for which the offender is liable to the injured husband.³ The statement indicates what is to be proved. The gist of the action however is not the loss of assistance, but the loss of the consortium of the wife,⁴ which term implies an exclusive right, against an invader, to her affection, companionship, and aid.⁵ It is indeed held to be unnecessary that there should be any separation or pecuniary injury ; in which respect the action resembles that of a parent for the seduction of his daughter. For example :

¹ For this paragraph the author is indebted to his learned friend, Mr. R. T. Wright, of the University of Cambridge, England.

² Chitty, Pleading, ii. 642, note.

³ Under changes partly silent, and partly effected by recent statutes, the wife, in the converse case, now has a corresponding right of action. *Westlake v. Westlake*, 34 Ohio St. 621; *Bennett v. Bennett*, 116 N. Y. 584; *Jaynes v. Jaynes*, 39 Hun, 40; *Warner v. Miller*, 17 Abb. N. C. 221; *Breiman v. Paasch*, id. 249; *Baker v. Baker*, 16 Abb. N. C. 293; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13; *Foot v. Card*, 57 Conn. 247; *Seaver v. Adams*, 19 Atl. Rep. 776. See however *Lynch v. Knight*, 9 H. L. Cas. 577; *Van Arnam v. Ayres*, 67 Barb. 544. Further, see Cooley, *Torts*, 267, 2d ed.

⁴ The old form of allegation in a case of master and servant was 'per quod servitium amisit ;' in a case of husband and wife, 'per quod consortium amisit.'

⁵ See Black. Com. iii. 139, 140; *Bigaouette v. Paulet*, 134 Mass. 123.

The defendant, by false insinuations against the plaintiff, and other insidious wiles, so prejudices and poisons the mind of the plaintiff's wife against him, and so alienates her affections from him, as to induce her to desire and seek to obtain, without just cause, a divorce; and by his false insinuations and wiles succeeds in persuading the wife to refuse to recognize the plaintiff as her husband. The defendant is liable; though no actual absence of the wife is caused.¹

This example, it will be observed, does not go to the extent of declaring a person liable for enticing away or corrupting the affections of the wife by reason of charges against the husband which are *true*; but there can be little doubt that such an act would be a breach of duty to the husband.² The constancy and affection of a wife are all the more valuable to him if his conduct is bad.

A difference is deemed to exist however between the act of a parent and that of other persons with regard to persuading a wife to leave her husband. In the case of one by parent. not a parent, it is certainly not necessary that bad motives should have inspired the act.³ It does not follow however that mere advice to a married woman by a stranger to leave her husband, upon representations by the wife, would be unlawful; advice in such a case is one thing, enticement is another.⁴

But it has been stated to be no breach of duty to the husband for a parent, upon information that his daughter is treated with cruelty by her husband or is subjected to other gross indignities such as would justify a separation, to go so far as to persuade her to depart from her husband; though it

¹ *Heermance v. James*, 47 Barb. 120.

² See *Bromley v. Wallace*, 4 Esp. 237. The conduct of the husband could be shown only in mitigation of damages. *Id.*

³ See *Hutcheson v. Peck*, 5 Johns. 196; *Bennett v. Smith*, 21 Barb. 439; *Mutter v. Knibbs*, 79 N. E. Rep. 762 (Mass.).

⁴ See *Mutter v. Knibbs*, *supra*.

subsequently appear that the parent's persuasion was based on wrong information.¹ It is held that bad motives must have actuated the parent in order to make him liable.² This seems to mean that the parent must either have enticed his daughter to leave or to stay away out of ill-will towards her husband, and not by reason of any good ground for their separation; or that he must have some end to gain of personal benefit to himself. In the absence of facts of this character, the parent is deemed not liable for persuading his daughter to absent herself from her husband on information justifying (if true) a divorce or even a departure of her own motion; though a stranger in blood would be liable.

Any person who receives into his house a married woman, who has abandoned her husband, or suffers her to stay there, after receiving notice from the husband not to harbor her, is deemed, *prima facie*, to violate a duty which he owes to the husband.³ But any one may, notwithstanding such notice, shelter the wife out of humanity, on reasonable representations by her that she has left her husband because of cruel treatment by him. For example: The defendant receives the plaintiff's wife into his house, upon representations of ill treatment by her husband; and he continues to permit her to remain there after notice from the plaintiff not to do so. The defendant is not guilty of a breach of duty to the plaintiff.⁴

Liability for harboring must probably be limited to cases in which the defendant has clear notice that the wife's act in coming to him, or in staying with him, is intended as a separation by her from her husband, and a repudiation of his claims as such. A man cannot at the present day be liable in damages for allowing a married woman to remain in his house a

¹ *Bennett v. Smith*, 21 Barb. 439, 443; *Mutter v. Knibbs*, *supra*.

² *Mutter v. Knibbs*, *supra*; *Hutcheson v. Peck*, *supra*.

³ *Winsmore v. Greenbank*, Willes, 577; s. c. L. C. Torts, 328. See *Addison*, Torts, 905, 4th ed.

⁴ *Philp v. Squire, Peake*, 82.

few days after notice not to do so, if she deny that she has abandoned her husband and claim that she is merely visiting, or that she is away from home for some other temporary and reasonable purpose. The defendant's liability, when it exists, rests upon the ground that he is a party to the unlawful purpose of depriving the plaintiff of the benefit of some advantage embraced under the designation of the consortium of his wife.¹ If the wife were disposed to stay an unreasonable length of time after notice from the husband, that fact would perhaps be sufficient to cause him to suspect her true purpose, and to render him liable in case he continued to permit her to remain.

It is settled law that the mere fact of receiving another's wife is not unlawful, even though no explanation whatever be offered.² There must be an enticing or harboring with reference to a wrongful separation. It is not enough even that the defendant take the plaintiff's wife to the defendant's house, upon request by her, unless he has notice that she is abandoning her husband; though he has been required by the plaintiff not to harbor her. For example: The defendant and the plaintiff are farmers and neighbors, residing about two miles apart. Their wives are relatives, and the plaintiff's wife often visits the defendant's; the defendant taking her to his house in his wagon. The plaintiff's wife on one occasion being so at the defendant's house, the plaintiff gives the defendant written notice not to harbor her, but to return her to his residence from which he (the defendant) has taken her. The defendant having stopped with the wife near her husband's house, she goes to enter it, but finds the door locked, and returns to the defendant, requesting him to take her to his house. The defendant shows her the notice, and advises her not to go, but she makes light of the matter, and is taken to the defendant's

¹ *Winsmore v. Greenbank*, Willes, 577; *Hutcheson v. Peck*, 5 Johns. 196; *Schuneman v. Palmer*, 4 Barb. 225.

² *Barnes v. Allen*, 1 Keyes, 390; *Schuneman v. Palmer*, supra. See also *Winsmore v. Greenbank*, supra.

house. The next day the defendant carries her home; and the plaintiff brings suit for the harboring. The action is not maintainable; the defendant not having attempted to influence the wife to leave her husband.¹

So much for enticing away a man's wife. The law gives a right of action also for 'criminal conversation' with one's wife, or, in many States, with one's husband;² and upon the same ground as that for enticing the wife away from her husband, to wit, the loss of Criminal
intercourse:
consortium. consortium.³ It arises accordingly without regard to the infliction of pecuniary damage.⁴

It follows that upon separation, by articles of agreement, the husband, having voluntarily parted with his wife's consortium, cannot maintain an action for criminal conversation with his wife.⁵ But if the separation was without any relinquishment by the husband of his right to the society of his wife, the action is maintainable. For example: The defendant, having entered into a contract for the support of the plaintiff's wife at his (the defendant's) house, the wife goes there under the agreement, and the defendant seduces her. The act is a breach of duty to the plaintiff, for which the defendant is liable.⁶

The mere fact of the husband's infidelity to his wife does

¹ Schuneman *v.* Palmer, 4 Barb. 225.

² Weedon *v.* Timbrell, 5 T. R. 357; Harvey *v.* Watson, 7 Man. & G. 644; Dunham *v.* McMichael, 214 Penn. St. 485; Bigaouette *v.* Paulet, 134 Mass. 128; Nolin *v.* Pearson, 191 Mass. 283, action by married woman against another woman sustained, under developments of modern society, in accordance with many cases cited on p. 290, but contrary to Duffies *v.* Duffies, 76 Wis. 374; Hodge *v.* Wetzler, 40 Vroom, 490; Lellis *v.* Lambert, 24 Ont. App. 653; Doe *v.* Roe, 82 Maine, 503; Morgan *v.* Martin, 92 Maine, 192.

³ Weedon *v.* Timbrell, 5 T. R. 357.

⁴ Wilton *v.* Webster, 7 Car. & P. 198.

⁵ Harvey *v.* Watson, 7 Man. & G. 644.

⁶ See Chambers *v.* Caulfield, 6 East, 244. Weedon *v.* Timbrell has been limited to this extent. See further Barbee *v.* Armstead, 10 Ired. 530.

not change the nature of the defendant's act in seducing and debauching her; though it may possibly, in contemplation of law, affect its enormity. For example: The defendant seduces and has criminal intercourse with the plaintiff's wife. Proof is offered by the defendant that the plaintiff had shown the greatest indifference and want of affection towards his wife; that while she lay dangerously ill at Y, the plaintiff (a surgeon in the navy), though his vessel was at Y, and he landed almost daily, was often at the door of the house where his wife lay sick, without visiting her, or showing any anxiety or concern for her; and at the same time that he had been guilty of adultery and had contracted a venereal disease. This is no defence to the action;¹ though it might be considered in mitigation of damages.²

If however the husband was accessory to his own dishonor, the case is different; he could not complain of an injury to which he had consented.³ For example: The plaintiff allows his wife to live as a prostitute, and the defendant then has intercourse with her. This is no breach of duty to the plaintiff.⁴

Mere negligence in regard to the wife's behavior; inattention or dulness of apprehension; or even permission of indecent familiarity in the husband's presence; such things are held insufficient to bar a recovery for criminal conversation with the wife, though they may be shown in reduction of damages. Unless the conduct of the husband amount to consent to the defendant's act of intercourse, the defendant is liable.⁵

¹ *Bromley v. Wallace*, 4 Esp. 237, overruling *Wyndham v. Wycombe*, id. 16.

² *Id.*; *Rea v. Tucker*, 51 Ill. 110.

³ 'Volenti non fit injuria.'

⁴ See *Cibber v. Sloper*, cited 4 T. R. 655; *Hodges v. Windham, Peake, 39; Sanborn v. Neilson*, 4 N. H. 501.

⁵ See *Rea v. Tucker*, 51 Ill. 110; *Sanborn v. Neilson*, 4 N. H. 501; *Foley v. Peterborough*, 4 Doug. 294; *Greenleaf, Evidence*, ii. § 51. But

It follows from what has been said that condonation of the wife's offence does not excuse the man who seduced her; the sole consequence of the condonation is that the husband is barred from obtaining a divorce. For example: The defendant has criminal intercourse with the plaintiff's wife, and, when fatally sick, the wife discloses the fact to her husband. The plaintiff continues to care for his wife kindly until her death. The defendant is liable.¹

on the amount of damages in such cases see *Duberley v. Gunning*, 4 T. R. 651. And as to that case see *Jones v. Sparrow*, 5 T. R. 257; *Chambers v. Caulfield*, 6 East, 244; *Blunt v. Little*, 3 Mason, 102, 106; *Bigelow's L. C. Torts*, 338.

¹ *Wilton v. Webster*, 7 Car. & P. 198; *Bernstein v. Bernstein*, 1892, 2 Q. B. 375; *Powers v. Powers*, 10 P. D. 174; *Sanborn v. Neilson*, 4 N. H. 501.

CHAPTER IX.

SLANDER AND LIBEL.

Statement of the duty. A owes to B the duty not to publish of B (1) defamation in its nature actionable per se, (2) defamation in its nature not actionable per se, to the damage of B.

Defamation is false imputation upon another's self, character, or reputation, in the way of slander or libel.

Slander is defamation published orally, or in equivalent manner.

Libel is defamation published by writing, print, or figure.

Defamation is published when one makes the imputation to or in presence of another, or when one causes it to come to the notice of another. Publication made without authority is publication only by the one making it.

Whenever language is spoken of as defamatory it is understood to be false.

What the phrase 'defamation in its nature actionable per se' means will be made known by the proposition of law following, and the consideration of its parts.

§ 1. DEFAMATION ACTIONABLE PER SE: WHAT MUST BE PROVED.

The general proposition of law is, that the first of the two duties above stated is violated by A, and B can maintain an action against him, without proving special damage, on proof of the publication by A of words, language, or figure of a false and defamatory character concerning B, in any of the follow-

ing ways: (1) Where A imputes to B the commission of a criminal offence punishable by imprisonment, or other corporal penalty, in the first instance,¹ clearly if the offence is indictable and involves moral turpitude, or is punishable by an infamous punishment;² (2) where A imputes to B the having a contagious or infectious disease of a disgraceful kind; (3) where A makes a derogatory imputation concerning B in respect of his office, business, or occupation;³ (4) where the defamation is a libel. Whether any one believed the defamatory charge is immaterial in regard to the right of action.⁴ Each of the foregoing classes of defamation must be examined.

§ 2. INTERPRETATION OF THE LANGUAGE.

Before proceeding to the consideration of any of these classes of breaches of duty, it should be observed that, subject perhaps to one exception, the language or figure complained of is to be understood presumptively in its natural and usual sense, i. e. in the sense in which the persons who heard or read or saw it, as men of ordinary intelligence, would understand it.⁵ It is not to be construed in a

¹ It is not enough, in England at least, that the offence is punishable by 'fine in the first instance, with possible imprisonment in default of payment.' *Webb v. Beavan*, 11 Q. B. D. 609. The offence charged need not in England be indictable. *Id.*

² *Brooker v. Coffin*, 5 Johns. 188; post, p. 291.

³ *Lovejoy v. Whitcomb*, 174 Mass. 586; *Morasse v. Brochu*, 151 Mass. 567; *O'Brien v. Times Publishing Co.*, 21 R. I. 256.

⁴ *Bishop v. Journal Newspaper Co.*, 168 Mass. 327.

⁵ *Hankinson v. Bilby*, 16 M. & W. 442; *Simmons v. Mitchell*, 6 App. Cas. 156; *Moss v. Harwood*, 102 Va. 386; *Thompson v. Sun Publishing Co.*, 91 Maine, 203; *Reid v. Providence Journal Co.*, 20 R. I. 120; *Clude v. Clute*, 101 Wis. 137. See *Gates v. New York Recorder Co.*, 155 N. Y. 228; *Richmond v. Loeb*, 19 R. I. 120. Whether the words in slander are legally defamatory or not is, commonly at least, a question of law. *Capital and Counties Bank v. Henty*, 7 App. Cas. 741. See *Thompson v. Sun Publishing Co.*, supra; also *Craig v. Pyles*, 101 Ky. 593; *Robertson v. Edelstein*, 104 Wis. 440; *Schurick v. Kollman*, 50 Ind. 336; *Blake v. Smith*, 19 R. I. 476; *Loranger v. Loranger*, 115 Mich. 681; these being

milder sense (' *mitiori sensu* ') merely because it is capable, by a forced construction, of being interpreted in an innocent sense. For example: The defendant publishes of the plaintiff the following words: ' You are guilty of the death of D.' This is an imputation of the commission of murder, and is not to be construed ' *mitiori sensu*. '¹

It should however be clear, in order to make language actionable without proof of damage, that the imputation was slanderous or libellous (according to its nature) within the meaning of some one of the above stated classes. If this be not the case, it will not be deemed a breach of the duty; and this too whether the question of interpretation come before the court or before the jury. In one case at least the interpretation adopted has been apparently contrary to the understanding of men of ordinary intelligence; and that is where an imputation is made of what would ordinarily be understood as a crime, but the language of which does not necessarily import a crime in the legal sense. An imputation of a criminal nature, which does not import a crime in the legal sense, is not actionable per se.²

cases of vile words applied to women, some actionable, others not. But if the meaning is doubtful, the question is for the jury. *Riddell v. Thayer*, 127 Mass. 487 ('bad woman'); *Flaacke v. Stratford*, 72 N. J. 487; *Hayes v. Ball*, 72 N. Y. 418. In criminal cases of libel the jury were made the judges whether the language was libellous or not, in England, by Fox's Act, 32 Geo. 3, c. 60. The same practice prevails in this country. The practice under Fox's Act has been adopted in England in civil cases of libel also; in some of our States the same is true (*Heller v. Pulitzer Publishing Co.*, 153 Mo. 205), in others not.

¹ *Peake v. Oldham*, 1 Cowp. 275; *Hayes v. Ball*, 72 N. Y. 418.

² *Ward v. Clark*, 2 Johns. 10. See *Crone v. Angell*, 14 Mich. 340; *Brown v. Hanson*, 53 Ga. 632. 'The offence need not be specified . . . at all if the words impute felony generally. But if particulars are given, they must be legally consistent with the offence imputed.' Pollock, *Torts*, 220, 2d ed., referring to *Jackson v. Adams*, 2 Bing. N. C. 402. See *Murphy v. Olberding*, 107 Iowa, 547; *Stitzell v. Reynolds*, 67 Penn. St. 54; *Brown v. Myers*, 40 Ohio St. 99; *Underhill v. Welton*, 32 Vt. 40. But see *Stroebel v. Whitney*, 31 Minn. 384. . The reason for the strictness

For example: The defendant publishes of the plaintiff the following words: ‘He has taken a false oath against me in Squire Jamison’s court.’ This is deemed not to be an imputation of the commission of perjury;¹ the term ‘perjury’ signifying the taking of a false oath knowingly, before a court of justice, with reference to a cause pending.

Apart from this particular exception in regard to the legal sense of a crime, it follows from what has been said that it is immaterial whether the defamatory charge be ^{Indirect use of language.} affirmative and direct, or indirect so as to be matter of inference merely, or that it is insinuating² or ironical, or that it is made in allegory or other artful disguise. It is enough that the charge would naturally be understood to be defamatory by men of average intelligence.

§ 3. PUBLICATION OF DEFAMATION AND SPECIAL DAMAGE.

Defamation is published when the charge, suggestion, insinuation, or representation is made, by the defendant, in presence of a third person, either by intention or by ^{What publication means.} negligence,³ or with reasonable ground to suppose that it will become known to others.⁴ Apart from such cases as the second and third, it is not published when addressed only to the plaintiff,⁵ no one else being present⁶ who could under-

of the rule no doubt is, that the plaintiff seeks to recover without proof of actual damage.

¹ *Ward v. Clark*, *supra*; Cases, 128.

² See *Haynes v. Clinton Printing Co.*, 169 Mass. 512.

³ *Vitzetelly v. Mudie’s Library*, 1900, 2 Q. B. 170.

⁴ *Rumney v. Worthley*, 186 Mass. 144; *Spaits v. Poundstone*, 87 Ind. 522; *Sylvis v. Millard*, 96 Tenn. 94.

⁵ Or to another by his direction. *Railroad v. Delaney*, 102 Tenn. 289.

⁶ *Sheffill v. Van Deusen*, 13 Gray, 304. See *Marble v. Chapin*, 132 Mass. 225, 226. Communication of defamation by the defendant to his wife has been held in England not to be publication. *Wennhak v. Morgan*, 20 Q. B. D. 635. But an accusation of the husband in the presence of his wife (or the converse) would be a publication. *Nolan v. Traber*, 49 Md. 460; *Hawver v. Hawver*, 78 Ill. 412; *Duval v. Davey*, 32

stand the language.¹ That is, the language or representation cannot in such a case be actionable as defamation. And this is true, though the alleged wrong be directly followed by great dejection of mind on the part of the plaintiff, and consequent sickness and inability to carry on his usual vocation, and expense attending upon his restoration to health or upon the employment of help to carry on his business. For example: The defendant says to the plaintiff, ‘ You have committed adultery with F.’ The plaintiff, a farmer, suffers immediate distress of mind and body, becomes sick and unable to attend to his work, his crops suffer, and he is compelled to employ extra help to carry on necessary work. The defendant has not violated any legal duty to the plaintiff.²

Indeed, if the language complained of be not actionable per se (that is, if it be not actionable without the proof of special damage), the fact that the publication of the defamation occurred in the presence of a third person who, by authority, reported it to the plaintiff with such a result as that stated in the foregoing example, would not, it is held, make the defamer liable.³

This however proceeds upon the ground that the effect of distress of mind, followed by sickness, is not such damage as the law requires when the defamation is not actionable per se. The rule of law upon this subject is, that defamation not actionable per se may be a breach of duty if it be attended with special damage. But special damage (and damage of a general nature as well) must

Ohio St. 604. See *Wenman v. Ash*, 13 C. B. 836, which suggests a doubt in regard to accusations of the wife made to the husband.

¹ See *Hurtert v. Weines*, 27 Iowa, 134. As to translations of foreign language see *Romano v. DeVito*, 191 Mass. 457; *Wilson v. Noonan*, 27 Wis. 598; *Monson v. Lathrop*, 96 Wis. 386, 389. Publication may be effected by negligence. *Loibl v. Breidenbach*, 78 Wis. 49; *Monsón v. Lathrop*, supra; *Rumney v. Worthley*, 186 Mass. 144; *Vitzetelly v. Mudie's Library*, 1900, 2 Q. B. 170.

² Compare *Terwilliger v. Wands*, 17 N. Y. 54, 63, and *Wilson v. Goit*, id. 442, which, taken together, justify the example.

³ *Terwilliger v. Wands*, 17 N. Y. 54, 63, reaffirmed in *Wilson v. Goit*,

be the natural and usual result of the wrong complained of, as effect follows cause; and, as it is sometimes declared in effect, mental distress with its consequences will not satisfy this doctrine, effect upon the mind and then upon health being largely due to individual peculiarities, and not being certain or uniform.¹ Or, better still, damage resulting from *fear* of injury to reputation, or from wounded feelings, is not damage to reputation; that can only be injured when it has been defamed before a third person.

The damage complained of must then in all cases, whether general or special, have been sustained through the action of a third person. Special damage may so result in several ways, so as to make the publication of def- Act of a third
person neces-
sary: ex-
amples.amation actionable when it would not be action- able per se; as by the loss of a marriage. For example: The defendant falsely charges the plaintiff, an unmarried female, with unchastity, in the presence and hearing of C, to whom the plaintiff is engaged to be married. C, in consequence of the charge, terminates the engagement. The defendant is liable to the plaintiff.²

The same would be true of the loss of the consortium of a wife³ and no doubt of a husband.⁴ The same would also be

¹ Id. 442, and overruling Bradt v. Towsley, 13 Wend. 253, and Fuller v. Fenner, 16 Barb. 333. But see McQueen v. Fulgham, 27 Texas, 463.

² Such damages are commonly spoken of as 'remote.' Compare Victorian Rys. Comm'r's v. Coulteras, 13 App. Cas. 222; Huston v. Freemansburg, 212 Penn. St. 548, 61 Atl. Rep. 1022, 3 L. R. A. 49; Spade v. Lynn R. Co., 168 Mass. 285; s. c. 172 Mass. 488. Some cases are contra. See 168 Mass. 290, and 212 Penn. St. 548; Helms v. Western Union Tel. Co., 55 S. E. Rep. 831 (N. Car.). But the authorities are not quite consistent; mental distress being treated as ground for damages if a right of action is otherwise shown. See ante, p. 62; Warren v. Boston & M. R., 163 Mass. 484, 487; Spade v. Lynn R. Co., 172 Mass. 488, 490, Holmes, J. (see s. c. 166 Mass. 285); Pugh v. London Ry. Co., 1896, 2 Q. B. 248.

³ See Terwilliger v. Wands, 17 N. Y. 54, 60. But see McQueen v. Fulgham, 27 Texas, 463.

⁴ Bigaouette v. Paulet, 134 Mass. 123.

⁴ See Lynch v. Knight, 9 H. L. Cas. 577; Jaynes v. Jaynes, 39 Hun,

true of the refusal to the plaintiff of civil entertainment at a public house.¹ So of the fact that the plaintiff has been turned away from the house of her uncle, and charged not to return until she shall have cleared up her character;² and so in general of the loss by the plaintiff even of gratuitous hospitable entertainment.³

The special feature of the law of slander and libel however consists in this, that defamation may be actionable per se; and the consideration of the various phases of such defamation will now follow. Let it be clearly observed, that in defamation arising under any of the heads now to be separately examined, the plaintiff establishes the breach of duty, and consequently his right to recover, by simply proving publication.⁴ In cases of defamatory publications not falling under the following heads, the plaintiff must also prove damage; that is the only difference between the two classes of cases.

§ 4. IMPUTATION OF HAVING COMMITTED A CRIME.

Different rules have obtained in different States concerning the nature of the offence the false imputation of which is actionable per se.

What sort of charge actionable: conflict of authority. In some States it has been laid down that, unless the offence charged is indictable and involves moral turpitude,⁵ or unless it is one the punishment of which is infamous, there is no right of action without proof of special damage. A punishment is infamous at common law which disqualifies the offender from being a witness in the courts; a punishment is

⁴⁰; *Warner v. Miller*, 17 Abb. N. C. 221; *Breiman v. Paasch*, 7 Abb. N. C. 249.

¹ *Olmsted v. Miller*, 1 Wend. 506. See *Moore v. Meagher*, 1 Taunt. 39.

² *Williams v. Hill*, 19 Wend. 305.

³ *Id. ; Moore v. Meagher*, 1 Taunt. 39; ante, p. 14.

⁴ *Webb v. Beavan*, 11 Q. B. D. 609. On the question who are publishers see *Youmons v. Smith*, 153 N. Y. 214 (liability of a printer).

⁵ *Lodge v. O'Toole*, 20 R. I. 405.

not infamous when, for instance, it is named in the same category with the punishment of trivial offences, such as vagrancy, begging, and fortune telling, and a charge of such an offence would not be actionable per se. For example: The defendant publishes of the plaintiff the charge 'She is a common prostitute.' The punishment of this offence, where charged, is classed with the punishment of trivial offences such as those just mentioned. The defendant is not liable without proof of special damage.¹

In other States probably, as in England, it would be enough that the crime was punishable in the first instance by imprisonment.² In still other States it is not necessary that the offence should be punishable by imprisonment at all, if the offence is punishable and disgraceful; this rule being laid down: Whenever an offence has been charged conviction of which subjects the offender to a punishment which, though not ignominious, would bring disgrace, the accusation, if false, is actionable per se.³ The offence accordingly need not be indictable; but it should, under the present head, impute a crime.

¹ *Brooker v. Coffin*, 5 Johns. 188; *Hemming v. Elliott*, 66 Md. 197; *Underhill v. Welton*, 32 Vt. 40; *Castleberry v. Kelly*, 26 Ga. 606; *Davis v. Carey*, 141 Penn. St. 314; *McQueen v. Fulgham*, 27 Texas, 463; *Pollard v. Lyon*, 91 U. S. 225. See also as to vile words against a woman, *Craig v. Pyles*, 101 Ky. 593; *Schurick v. Kollman*, 50 Ind. 336; *Andres v. Koppenheaver*, 3 Serg. & R. 255; ante, p. 286, note. Statute in some States makes such an imputation upon a woman actionable per se. *Hemmens v. Nelson*, 138 N. Y. 517; *Loranger v. Loranger*, 115 Mich. 681; *Campbell v. Irwin*, 146 Ind. 681. Some statutes make the oral imputation a misdemeanor. *State v. Forrester*, 63 Mo. App. 530; *State v. Mills*, 116 N. Car. 1051. Perhaps charges of crime punishable by imprisonment in a state prison would cover the class of cases spoken of in the text. Common-law punishments of the pillory, stocks (?), and the like were infamous; but these are of the past. *Ex parte Wilson*, 114 U. S. 417. Punishment of simple assaults or batteries is not infamous. *Andres v. Koppenheaver*, supra; *Billings v. Wing*, 7 Vt. 439.

² Ante, p. 285, note.

³ *Miller v. Parish*, 8 Pick. 384; *Brown v. Nickerson*, 5 Gray, 1 (imputing drunkenness to a woman in a single instance). See *Meyer v. Schleichler*, 29 Wis. 646; *Frisbie v. Fowler*, 2 Conn. 707; *Zeliff v. Jennings*, 61 Texas, 458, 466. To charge one with selling his vote at an

It is not necessary anywhere that the accusation should be of the commission of a crime in the strict sense ; enough, even where the first rule above stated prevails, that the charge of misdemeanor. imputation is of the commission of a misdemeanor if the offence involves moral turpitude.¹ For example : The defendant falsely publishes of the plaintiff the words " You have removed my landmarks, and cursed is he that removeth his neighbor's landmark." The words are actionable per se.²

The authorities, further, are not altogether in harmony in regard to the question whether it is necessary that the charge, if true, would subject the object of it to punishment, or whether the test in this particular is the degradation involved; but the weight of authority favors the latter as the test, assuming that the offence charged is in law a crime. Although then the charge shows that the punishment has already been suffered, and does not render the plaintiff liable to indictment, the degradation involved in the (false) accusation makes the defendant liable.³ For example : The defendant falsely says of the plaintiff, ' Robert Carpenter [the plaintiff] was in Winchester jail, and tried for his life, and would have been hanged had it not been for L, for breaking open the granary of farmer A, and stealing his bacon.' The defendant is liable.⁴ Again : The defendant falsely says of the plaintiff, ' He was arraigned at Warwick for stealing of twelve hogs, and, if he had not made good friends,

election is not actionable without proof of special damage. *Doyle v. Kirby*, 184 Mass. 409.

¹ *Young v. Miller*, 3 Hill, 21; *Smith v. Smith*, 2 Snead, 473; *Reck v. Stitzel*, 21 Penn. St. 522. See *Andres v. Koppenheaver*, 3 Serg. & R. 255.

² *Young v. Miller*, supra. But the meaning of 'moral turpitude' is not fixed.

³ Of course if the charge is in writing, it is libellous. *Morrissey v. Telegram Publishing Co.*, 19 R. I. 124.

⁴ *Carpenter v. Tarrant*, Cas. temp. Hardw. 339. The plaintiff always alleges falsity of the charge, but he need not prove it.

it had gone hard with him.' The defendant is liable.¹ Again: The defendant falsely says of the plaintiff, 'He is a convict, and has been in the Ohio penitentiary.' The plaintiff can maintain an action, the words being false.²

Indeed it could not be correct in any case to make it the test, that the imputation *subjects* the accused to danger of punishment, for an imputation merely would not be likely to bring on punishment even if the accused were guilty;³ and when the accused is innocent, as he must be to maintain an action for defamation, it is, legally speaking, impossible that the imputation should lead to punishment. The most that could be said is, that the imputation might perchance lead to an arrest and then possibly to a trial of the accused. It is enough that the offence charged is punishable in the first instance by imprisonment.

§ 5. IMPUTATION OF HAVING A CONTAGIOUS OR INFECTIOUS DISEASE OF A DISGRACEFUL KIND.

By the early common law a charge to come under this head must have been of having the leprosy, or the plague, or the syphilis. At the present time the duty has come ^{Extension of} the law. to be so far enlarged as to make it actionable to publish false accusations concerning another of the having any disease of a contagious or infectious nature involving disgrace. For example: The defendant falsely charges the plaintiff with having the gonorrhœa. This is actionable per se.⁴

¹ *Halley v. Stanton*, Croke Car. 268.

² *Smith v. Stewart*, 5 Barr, 372. It would be otherwise if the words were true. *Baum v. Clause*, 5 Hill, 199. A person is no longer a felon after suffering the punishment of felony; so that the fact that he was once a felon would not sustain a plea of the truth of a charge of felony. *Leyman v. Latimer*, 3 Ex. Div. 352.

³ See the rule in *Lumby v. Allday*, 1 Cromp. & J. 301; s. c. 1 Tyrwh. 217; *Capital and Counties Bank v. Henty*, 7 App. Cas. 771, 772, Lord Blackburn.

⁴ *Watson v. McCarthy*, 2 Kelly, 57. See *Bloodworth v. Gray*, 7 Man. & G. 334.

This doctrine of law proceeds upon the ground that charges of such a kind tend to exclude a person from society; and the rule requires the charge to be made in the present tense. To accuse another falsely of having had a disgraceful disease is not actionable without proof of special damage. For example: The defendant says of the plaintiff, 'She has *had* the pox.' The defendant is not liable though the charge be false, unless the plaintiff prove special damage.¹

§ 6. IMPUTATION AFFECTING THE PLAINTIFF IN HIS OFFICE, BUSINESS, OR OCCUPATION.

In order that an imputation may in law be said to affect a man injuriously under this head, and be actionable *per se*, it should have a natural tendency to harm him in his occupation. It is not enough that it may possibly so injure him. If it has not a natural tendency to injure him, that is, if it would not be the usual effect of the charge to injure the plaintiff in his occupation, as by causing his discharge, the plaintiff cannot recover without proving special damage. For example: The defendant publishes of the plaintiff, a clerk to a gas-light company, the words, 'You are a disgrace to the town, unfit to hold your situation for your conduct with harlots. You are a disgrace to the situation you hold.' The plaintiff cannot recover without proof of actual damage, the language not having a natural tendency to cause the plaintiff's discharge from his employment.²

Defamation has a natural tendency to injure the plaintiff in his office, business, or occupation, within the meaning of the rule, when for instance it strikes at his qualification for the performance of the duties of the place, or alleges some miscon-

¹ See *Carslake v. Mapledoram*, 2 T. R. 473; s. c. L. C. Torts, 84.

² *Lumby v. Allday*, 1 Tyrwh. 217. If the imputation had been adultery, it would have been actionable *per se*, under the head of imputations of crime. Indeed the rule laid down in *Lumby v. Allday* — the natural tendency of the charge — might well have been held enough, and perhaps now would be. *Capital and Counties Bank v. Henty*, 7 App. Cas. 771, 772, Lord Blackburn; *Morasse v. Brochu*, 151 Mass. 567, 576.

duct or negligence in the course of transacting these duties, or business embarrassment or want of credit in the case of a merchant.² For example: The defendant charges the plaintiff, a clergyman, holding the office of pastor of a church, with incontinence. This is ground of an action.³ Again: The defendant says of the plaintiff, a lawyer, the words having relation to the plaintiff's professional qualifications, 'He is a dunce.' This may perhaps be treated as a breach of the defendant's legal duty to the plaintiff.⁴

When the defamation complained of does not show on its face that it was published of the plaintiff in relation to his occupation, this must be made to appear;⁵ though even then, as has been stated, the defamation will not be actionable unless it had a natural tendency to injure the plaintiff in his occupation, in the sense already explained. In cases however in which the imputation is alleged to have been made of the plaintiff in his occupation, when the same does not have the natural tendency mentioned, it may be shown by the plaintiff that the defamation *was* published under circumstances which bring the case within the rule of liability. But without such evidence, the plaintiff must fail. For example: The defendant charges the plaintiff, as a physician, with incontinence. This, it has been considered, does not imply disqualification, or necessarily professional misconduct; and, without evidence connecting the imputation with the plaintiff's professional conduct, he cannot recover.⁶

If the imputation in itself come within the rule of liability

¹ *Lumby v. Allday*, *supra*; *Camp v. Martin*, 23 Conn. 86.

² *McIntyre v. Weinert*, 195 Penn. St. 52.

³ *Gallwey v. Marshall*, 9 Ex. 294.

⁴ *Peard v. Jones*, Croke Car. 382. It is doubtful whether a court would now treat such a statement as actionable. To call a lawyer a 'cheat' is held actionable. *Rush v. Cavanaugh*, 2 Barr, 187. Further see *Goodenow v. Tappan*, 1 Ohio, 60; *Doyley v. Roberts*, 3 Bing. N. C. 835.

⁵ *Ayre v. Craven*, 2 Ad. & E. 2.

⁶ *Id.* But as to this case see *Morasse v. Brochu*, 151 Mass. 567, 576.

under this head, it matters not that it was published of a servant, even one acting in a menial capacity.

Servants. For example: The defendant falsely speaks the following of the plaintiff, a menial servant, before the latter's master: 'Thou art a cozening knave, and hast cozened thy master of a bushel of barley.' The defendant is liable to the plaintiff.¹

It is probably actionable to impute disqualification of a person holding a merely honorary or confidential office, not of Honorary emolument.² It certainly is so to impute to such office. a person misconduct in the office.³ For example: The defendant says of the plaintiff, who holds a public office of mere honor, touching his office, 'You are a rascal, a villain, and a liar.' This is deemed actionable.⁴

In all cases included under the present section, it is necessary that the plaintiff should have been in the exercise of the Exercise of duties of the particular vocation at the time of vocation. the alleged publication of the defamation; if he was not, he cannot maintain an action without proving special damage.⁵ For example: The defendant says of the plaintiff, who had been a lessee of tolls at the time referred to by the defendant, 'He was wanted at T; he was a defaulter there.' The words are not actionable per se.⁶

§ 7. IMPUTATION TENDING TO DISINHERIT THE PLAINTIFF.

If the words tend to impeach a present title of the plaintiff, Doubt in regard to such cases. the action, though commonly called an action for *slander* of title, is not properly speaking an action of slander; as has already been stated, such a case

¹ *Seaman v. Bigg*, Croke Car. 480.

² *Onslow v. Horne*, 3 Wils. 186.

³ *Id.*

⁴ *Aston v. Blagrave*, Strange, 617.

⁵ *Bellamy v. Burch*, 16 M. & W. 590; *Gallwey v. Marshall*, 9 Ex. 294. See *Ritchie v. Widdeemer*, 59 N. J. 290.

⁶ *Bellamy v. Burch*, *supra*. Some of the old cases are *contra*, but they were overruled.

is ground for a special action, governed by rules of law distinct from those of defamation.¹

Cases of actions for defamation tending to defeat an expected title are rare, and appear to have been confined to charges impeaching the legitimacy of birth of an heir apparent. Such an imputation has been deemed actionable, as being likely to cause the plaintiff's disherison.² But that is unsound doctrine, and has met with no favor in modern times. The reason is plain; the act complained of is no violation of any legal right, since the heir apparent can have no legal right to the inheritance. The ancestor owns the estate, and may do as he will with it.³ Damage must be proved.

§ 8. IMPUTATION CONVEYED BY WRITING, PRINTING, OR FIGURE; THAT IS, OF LIBEL.

The preceding sections exhaust the possible heads of oral defamation actionable per se; that is, of slander. Libellous defamation may also be conveyed in any of the four ways above considered; but it may also be conveyed in other ways. A libel is a writing, print, picture, or effigy, calculated to bring one into hatred, ridicule, or disgrace, and within this definition at any rate is actionable without proof of damage.⁴

The definition shows that the law of libel is of wider extent than that of slander. Many words when written or printed become actionable per se which, if they had been orally published, would not have been actionable without proof of special damage; such as imputations or in-

¹ See *ante*, pp. 199-203.

² *Humphrys v. Stanfield*, Croke Car. 469.

³ *Hoar v. Ward*, 47 Vt. 657; *Onslow v. Horne*, 3 Wils. 188.

⁴ *Hollenbeck v. Hall*, 103 Iowa, 214; *McDermott v. Union Credit Co.*, 76 Minn. 84, 87; *Moss v. Harwood*, 102 Va. 386. It seems that in some States libel is not necessarily actionable per se, but must sometimes be supported by special damage. See *Burr's Tool Works v. Peninsular Manuf. Co.*, 142 Mich. 417.

situations of dishonesty, lying, bad credit, unfaithfulness to employment, lascivious conduct, unchastity, loose behavior in women, or anything else which would bring discredit upon one's good name. And besides these there is the whole class of defamatory representations such as picture and effigy, which in their nature are incapable of oral publication. Whether the distinction is well founded or not, the manner of the publication, as libel, makes it actionable.¹ For example: The defendant writes and publishes of the plaintiff the following: 'I sincerely pity the man that can so far forget what is due not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods.' The plaintiff can maintain an action for libel.² Again: The defendant prints the following of the plaintiff: 'Our army swore terribly in Flanders, said Uncle Toby; and if Toby was here now, he might say the same of some modern swearers. The man at the sign of the Bible [the plaintiff] is no slouch at swearing to an old story.' The imputation is libellous, though not importing perjury.³ Again: The defendant prints the following of the plaintiff: 'Mr. Cooper [the plaintiff] will have to bring his action to trial somewhere. He will not like to bring it in New York, for we are known here, nor in Otsego, for he is known there.' The publication of this language is deemed libellous.⁴

¹ *Thorley v. Kerry*, 4 *Taunt.* 355; *McDermott v. Union Credit Co.*, 76 Minn. 84; *Haynes v. Clinton Printing Co.*, 169 Mass. 512; *Moss v. Harwood*, 102 Va. 386. See *Call v. Hayes*, id. 586. Written words importing want of chastity are actionable *per se*, whether the oral imputation would or would not be, and whether of women or of men. *Bishop v. Journal Newspaper Co.*, 168 Mass. 327; *McLean v. Scripps*, 52 Mich. 214; *Farrand v. Aldrich*, 85 Mich. 593; *Collins v. Dispatch Pub. Co.*, 152 Penn. St. 187; *Wilcox v. Moon*, 63 Vt. 481; *Smith v. Matthews*, 152 N. Y. 152; *Lanning v. Christy*, 30 Ohio St. 115. This is a matter of statute in some States. *Miller v. McDonald*, 139 Ind. 465.

² *Thorley v. Kerry*, *supra*.

³ *Steele v. Southwick*, 9 Johns. 214.

⁴ *Cooper v. Greeley*, 1 Denio, 347.

At common law no immunity is conferred upon the proprietors, publishers, or editors of books, newspapers, or other prints, for the publication of defamation. They are liable for the publication of libellous matter in their prints, though the publication may have been made without their knowledge or even against their orders. This is not true of news-vendors.¹ And it is held that if the alleged libel were of such a nature that a man of common intelligence could not know that it was intended for a libel, and it was not in fact known that it was, neither the editor nor the proprietor of the printing establishment, or of the print, would be liable.²

Publishers of
books, news-
papers, etc.

Legislation in various States has touched the subject of newspaper libel more or less.

The distinction between slander and libel, making libel a crime as well as a tort, has its roots in the feudal age. Written defamation, in rhyming lampoon, was then a common and effective weapon of war between great men; while slander, though also then as now not unknown among men of high degree and sometimes punished as a crime, was commonly settled on the spot and not taken into court, for that would have been thought cowardly.

Distinction be-
tween slander
and libel.

How bitter and dangerous the libel of those times was apt to be may be seen in such a one as the Ballad of Richard of Almaign,³ lampooning the King's brother for cowardice at the battle of Lewes (1264).⁴ One can well understand that libel then should have been held a crime. The (abolished) Statute of Scandalum Magnatum⁵ was a direct expression of the law; but the idea of danger in the written word itself, by easy confusion, took root (helped no doubt by the familiar line 'Vox

¹ *Emmens v. Pottle*, 16 Q. B. Div. 357.

² *Smith v. Ashley*, 11 Met. 367.

³ *Percy's Reliques*, i. 246 (Bohn).

⁴ Wright's Political Songs (Camden Society) contains others. See also *Law Quarterly Review*, July, 1902, p. 261.

⁵ See Odgers, *Slander and Libel*, 94, 447, 503, 3d ed.

emissa volat, littera scripta manet"), and hence the law of libel. This has one strong justification in our day, to wit, in the power and danger of the press. As for the rest, the distinction in question, and other distinctions between slander and libel, have little importance; people do not trouble the courts much with petty causes of either kind.

§ 9. TRUTH OF THE CHARGE.

The truth of the charge, whether the charge was made orally or by printed or written language, if fully proved,¹ is, in the absence of statute,² a defence to an action for damages for the publication of alleged defamation, though malicious and not reasonably believed to be true.³ Evidence of such a fact shows indeed that the charge is not legally defamatory. A person has no right to a false character; and his real character suffers no damage, such at least as the law recognizes, from speaking the truth.

The truth an
absolute de-
fence, not
affected by
malice.

This rule appears to go to the extent of justifying a party in publishing of another the fact that he has suffered the penalty of the law for the commission of crime, even though he may have been pardoned therefor and have since become a good and respectable citizen. For example: The defendant publishes of the plaintiff the statement that the latter had several years ago stolen an axe. That is true, though, after conviction thereof, the plaintiff was pardoned, and has since

¹ See *Murphy v. Olberding*, 107 Iowa, 547, charge of crime; *Neilson v. Jensen*, 56 Neb. 430. If the charge contains particulars, all must be established if the truth is set up. See the cases just cited. It is a dangerous defence to plead, for to fail in establishing *may* show malice, in the absence of statute. *Moore v. Beck*, 71 N. J. 7. See *Odgers, Slander and Libel*, 201, 3d ed. On the whole subject see *Odgers*, chap. vii.

² There are statutes upon the subject in some of the States, probably in most of the States as to criminal prosecutions for libel.

³ *McCloskey v. Pulitzer Publishing Co.*, 152 Mo. 339.

become a trusted citizen and an office-holder. The accusation is deemed justifiable in law.¹

Belief in the truth of the accusation however is not a defence,² though the law allows the defendant to show it in mitigation of damages.³ The charge, being renewed in the allegation that it was true, must be fully made out by the defendant.⁴ And this is equally true of the editors and publishers of books, newspapers, or periodicals, as of other persons.⁵

The truth of effigy, picture, or sign, so far as such may relate to the physical person of the party intended, and not to his character, is probably no justification of *Truth of effigy or picture.* a malicious publication. A man is not responsible for his physical peculiarities, and may well invoke protection of the law against one who will parade them before the public.⁶

§ 10. PRIVILEGED COMMUNICATIONS : MALICE.

The plaintiff in an action for defamation is entitled to recover upon proof of the publication (with special damage if the case does not fall under one of the four heads); proof of malice, in other words malice as an entity, is not necessary, in any sense of the term, to make a case. It is indeed common to say that malice is presumed or implied upon proof of the publication; but

*Malice not
necessary to
the action.*

¹ *Baum v. Clause*, 5 Hill, 199. See *Rex v. Burdett*, 4 B. & Ald. 314, 325.

² *Campbell v. Spottiswoode*, 3 Best & S. 769; *Smith v. Johnson*, 69 Vt. 231.

³ *Odgers, Slander*, 393, 607, 3d ed.

⁴ *Murphy v. Olberding*, 107 Iowa, 547.

⁵ *Campbell v. Spottiswoode*, *supra*.

⁶ Compare *Pollard v. Photographic Co.*, 40 Ch. D. 345, 353, enjoining display of photograph; *Hanfstaengl v. Empire Palace*, 1894, 2 Ch. 1; *Hanfstaengl v. Newnes*, 1894, 3 Ch. 109. But see *Dockrell v. Dougall*, 78 Law T. Rep. 840; *Atkinson v. Doherty*, 80 N. W. Rep. (Mich.) 285, denying the so-called right of privacy.

that means nothing, and is only misleading, for the presumption or implication cannot be overturned by evidence of want of malice. Malice, touching the making a *prima facie* case, is only a name arbitrarily applied; it is simply a fiction and the allegation surplusage.

If this were all, the result would be that, unless the defendant could prove the truth of the charge, he would be liable.

Occasion may justify defamatory publication. But this would be to lay an embargo upon the freedom of speech not to be tolerated. There are circumstances under which men must be permitted to speak their convictions, however erroneous; the law could not but permit, and hence does permit it.¹

There are, in a word, occasions in which one is excused for publishing what would otherwise be actionable defamation.² The publication of the charge in such cases is said to be 'privileged'; the charge itself being termed a privileged communication.

It is obvious that the 'occasions' mentioned may be of varying importance; they may be slight, they may be of great moment. Between man and man, in the ordinary course of things, they may be slight as compared with occasions when public justice or the public interest is at stake; for it is plain that public, and very soon thereafter private, welfare would suffer if a high order of privilege were not given to such cases. The occasions have been divided into two classes simply, for it would be impracticable to maintain a series of progressive grades, according to the supposed importance of each one.

¹ The doctrine of privileged communications is only a special example of a great law of privilege pertaining to human affairs generally; to wit, the right to inflict harm upon another in just so far as may reasonably be deemed necessary for one's own protection, or for the protection of another, where that is proper. So far others must yield, or the vindication of rights in many cases would be an empty name; but further no one is required to give way.

² *Merivale v. Carson*, 20 Q. B. Div. 279, 280, Lord Esher pointing out that what all men may do (i. e. what is of legal right) is no privilege. See post, § 11, and note.

Privileged communications are accordingly of two kinds ; and these have been called absolutely privileged and *prima facie* privileged communications.¹ Absolute privilege imports that the privilege cannot be overturned by evidence that the publication was made with malice (as an entity) ; *prima facie* privilege, that the privilege may be overturned by such evidence. Here, in answer to a *prima facie* privilege, set up in defence, is the domain of malice, as a subject of proof, in regard to the right of action for defamation.

Apart from statute, absolute privilege is confined to the State, and that too to its three departments, legislative, executive,² and judicial ; such privilege being justified only upon grounds of necessity.

First then of statements made in judicial proceedings. The following is the general rule:

Whatever is said orally, or stated in writing, in the course of and duly relating to such proceedings by those concerned therein, is absolutely privileged. According to recent English authority, it matters not whether the language was material or relevant, or not ; it is deemed to be against public policy to permit any inquiry in regard to that.³ It is enough if it relates to the cause before the court. For example : Counsel for the defendant, in the course of arguing a criminal cause, makes base insinuations against the prosecutor in relation to the evidence given, which insinuations would be actionable if not privileged. No action can be maintained for making them ;

*Kinds of
privilege.*

*Absolute privi-
lege: what
it includes:
proceedings of
the courts.*

¹ Hastings *v.* Lusk, 22 Wend. 410 ; Shelfer *v.* Gooding, 2 Jones, 175.

² Including, it seems, the chief executive of a city, in his official communications. Trebilcock *v.* Anderson, 117 Mich. 39 ; Wachsmuth *v.* Merchants' Bank, 96 Mich. 427.

³ Complaint before a magistrate, Laing *v.* Mitten, 185 Mass. 233 ; counsel in preparing proof for trial, Watson *v.* McEwan, 1905, A. C. 480 (H. L. Sc.) ; Law *v.* LLewellyn, 1906, 1 K. B. 487 (magistrate a judge) ; Hodson *v.* Pare, 1899, 1 Q. B. 455 (the same) ; Munster *v.* Lamb, 11 Q. B. Div. 588 (counsel) ; Scott *v.* Stansfield, L. R. 3 Ex. 220 (judge) ; Seaman *v.* Netherclift, 2 C. P. Div. 53 (witness) ; Henderson *v.* Broomhead, 4 H. & N. 569 (statements in pleadings).

no inquiry into their bearing upon the case will be allowed.¹ Again: A witness on the stand, after examination, volunteers a statement in vindication of himself, which contains a charge of crime against a stranger to the trial. This is not actionable.²

Formerly relevancy appears to have been regarded in England; ³ and in this country it is generally laid down that the language used, in order to be absolutely privileged, must either have been legally relevant or must have been believed to be relevant. This has been laid down of the language of parties,⁴ of counsel,⁵ of witnesses,⁶ of jurymen,⁷ and of pleadings.⁸ For example: The defendant, in the argument of his own cause in court, falsely charges perjury upon the plaintiff, the charge not being relevant, or believed by the defendant to be relevant, to any question before the court. The defendant is liable.⁹ Again: The defendant, during the deliberations of a jury of which he is a member, held in the jury room, concerning their verdict in a suit brought by the present plaintiff, says he would not believe the plaintiff under oath, and accuses him of having

¹ *Munster v. Lamb*, 11 Q. B. Div. 588.

² *Seaman v. Netherclift*, *supra*.

³ *Hoar v. Wood*, 3 Met. 193, 198; *Hastings v. Lusk*, 22 Wend. 410; *Hodgson v. Scarlett*, 1 B. & Ald. 232.

⁴ *Hoar v. Wood*, *supra*.

⁵ *Hastings v. Lusk*, *supra*; *Youmans v. Smith*, 153 N. Y. 214; *Marsh v. Ellsworth*, 50 N. Y. 309; *McDavitt v. Boyer*, 169 Ill. 475, 483; *Hoar v. Wood*, *supra*; *McLaughlin v. Cowley*, 127 Mass. 316, 319; *Rice v. Coolidge*, 121 Mass. 393; *Jennings v. Paine*, 4 Wis. 358; *Morgan v. Booth*, 13 Bush, 480.

⁶ *Sheppard v. Bryant*, 191 Mass. 591; *McDavitt v. Boyer*, *supra*; *White v. Carroll*, 42 N. Y. 161; *Barnes v. McCrate*, 32 Maine, 442; *Calkins v. Sumner*, 13 Wis. 193; *Lea v. White*, 4 Sneed, 111; *Storey v. Wallace*, 60 Ill. 51; *McLaughlin v. Cowley*, *supra*; *Rice v. Coolidge*, *supra*. See *Acre v. Starkweather*, 118 Mich. 214.

⁷ *Dunham v. Powers*, 42 Vt. 1.

⁸ *McLaughlin v. Cowley*, *supra*; *Wyatt v. Buell*, 47 Cal. 624; *Garr v. Selden*, 4 Comst. 91; *Johnson v. Brown*, 13 W. Va. 71.

⁹ *Hastings v. Lusk*, 22 Wend. 410.

obtained an insurance upon property by fraud and afterwards committing perjury in a suit for the insurance money. This is not legally relevant, but the defendant acts honestly believing it to be so and that he is discharging his duty in the matter. The plaintiff cannot recover.¹

The protection extends to the allegations contained in affidavits made in the course of a trial,² even though the persons making them be not parties to the cause;³ and to statements of a coroner holding an inquest.⁴ In a word, it applies apparently to all statements made in the real discharge of duty in court.⁵

How far the
privilege
extends.

The law upon this subject has been thus (in substance) summarized: No action either for slander or libel can be maintained against a judge, magistrate, or person sitting in a judicial capacity over any court, judicial, military,⁶ or naval, recognized by and constituted according to law; nor against suitors, prosecutors, witnesses, counsel, or jurors, for anything said or done relative to the matter in hand, in the ordinary course of a judicial proceeding, investigation, or inquiry, civil or criminal, by or before any such tribunal, however false and malicious it may be.⁷

A like rule of law to that by which defamatory statements made in the course of judicial proceedings are privileged governs all statements and publications made in the course of the proceedings of the Legislature,⁸ and

Proceedings of
Legislature.

¹ *Dunham v. Powers*, 42 Vt. 1.

² *Garr v. Selden*, 4 Comst. 91.

³ *Henderson v. Broomhead*, 4 H. & N. 569.

⁴ *Thomas v. Churton*, 2 Best & S. 475.

⁵ *Goodenow v. Tappan*, 1 Ohio, 60; *Dunham v. Powers*, supra.

⁶ *Jekyll v. Moore*, 2 Bos. & P. N. R. 341; *Dawkins v. Rokeby*, L. R.

⁸ Q. B. 255; s. c. 7 H. L. 744, 752 (witness); *Dawkins v. Saxe-Weimar*, 1 Q. B. D. 499.

⁷ Starkie, *Slander and Libel*, 184 (4th ed. by Folkard); *Munster v. Lamb*, 11 Q. B. Div. 588, and cases cited.

⁸ *Odgers, Slander*, 187.

in committees of the same.¹ The occasion is deemed to afford an absolute justification for the use of language otherwise actionable, so long as it relates to the proceedings under consideration. No member of the Legislature is liable in a court of justice for anything said by him in the transaction of the business of the House to which he belongs, or in which he has duties to perform, however offensive the same may be to the feelings or injurious to the reputation of another.²

This privilege however is absolute only within the walls of the House, or of such other places as committees are authorized to occupy.³ It is not personal, but local. A member who publishes slander or libel generally, outside of such locality, stands, it seems, on the same footing with a private individual.⁴ For example: A member of Parliament prints and circulates generally a speech delivered by him in the House, containing defamatory language of the plaintiff. This is a breach of duty to the plaintiff.⁵

The same protection is extended to persons presenting petitions to the Legislature, and with the same restriction. The printing and exhibiting a false and defamatory petition to a committee of the Legislature, and the delivery of copies thereof to each member of the committee, is justifiable, unless perhaps the petition is a mere sham, fraudulently put forth for the purpose of defaming an individual. But a publication to any others than the members of the committee, or at

¹ *Sheppard v. Bryant*, 191 Mass. 491; *Wright v. Lothrop*, 149 Mass. 385, 389.

² See *Ex parte Wason*, L. R. 4 Q. B. 573; *Commonwealth v. Blanding*, 3 Pick. 304, 314; *Coffin v. Coffin*, 4 Mass. 1, a very important case; *Sheppard v. Bryant*, 191 Mass. 591; *Hastings v. Lusk*, 22 Wend. 410, 417; s. c. L. C. Torts, 121, 124; *McGaw v. Hamilton*, 184 Penn. St. 108.

³ *Goffin v. Donnelly*, 6 Q. B. D. 307. See *Belo v. Wren*, 63 Texas, 686, irregular and irresponsible committee.

⁴ See however *Coffin v. Coffin*, *supra*, as to words not in the course of business.

⁵ *Rex v. Abingdon*, 1 Esp. 226; *Rex v. Creevey*, 1 Manle & S. 273; *Stockdale v. Hansard*, 9 Ad. & E. 1. As to private circulation of speeches among constituents, see *Wason v. Walter*, L. R. 4 Q. B. 73, 95.

any rate to others than members of the Legislature, removes the protection, and renders the author liable.¹

Absolute privilege extends also to the acts and proceedings of the Executive Department, whether of the general government of the country or of the States,² or of colonies,³ or, it seems, of cities.⁴

Proceedings
of the Exec-
utive.

In other relations than those of the State, there is seldom any need of absolute privilege; between man and man, outside of the affairs of State, the occasion can create only a *prima facie* privilege. The defendant here shows privilege as before; but now, it should be noticed, the plaintiff may in turn show (actual) malice, and so cut away the ground of the supposed privilege, for *prima facie* privilege rests on good faith.⁵ It is founded upon interest or duty, as will appear later.

Prima facie
privilege.

This head embraces a great variety of cases; only the most important of these will be presented, from which a general rule may be deduced.

Proceedings before church organizations, societies, clubs, and other voluntary bodies, touching the objects for which they are formed, may be mentioned first. Proceedings of such bodies, for the discipline of their members, partake somewhat of the nature of trials in the courts. Though forming no part of the general administration of justice, such proceedings, when not in conflict with the law, are sanctioned by the State. Accordingly, language used in conducting them is privileged, *prima facie*, so far as it is pertinent to the matter under consideration. For example:

Proceedings
of voluntary
societies.

¹ *Lake v. King*, 1 Saund. 131 b, where this is conceded; *Hare v. Miller*, 3 Leon. 138, 163. See *Proctor v. Webster*, 16 Q. B. D. 112, as to communications to the Privy Council.

² *Spalding v. Vilas*, 164 U. S. 483. See *Chatterton v. Secretary of State*, 1895, 2 Q. B. 189.

³ *Chatterton v. Secretary of State*, supra.

⁴ *Trebilcock v. Anderson*, 117 Mich. 39; *Wachsmuth v. Merchants' Bank*, 96 Mich. 427.

⁵ *Ante*, p. 15.

The defendant, while on trial before a church committee for alleged falsehood and dishonesty in business, says of the plaintiff, ‘I discharged him for being dishonest, — for stealing. That is the cause of this trouble.’ The defendant is not liable in the absence of evidence that he was actuated by express malice.¹

The proceedings of the courts of justice should, with some necessary exceptions, be under the eyes of the public, so that judges may sufficiently feel their responsibility.² Publication of proceedings of the courts. But the whole public cannot attend the courts, and it is proper therefore that such of their proceedings as are open should be made known generally. It is accordingly laid down that the publication of proceedings had in open court, if sufficiently full to give a correct and just impression of the proceedings, and if not attended with defamatory comments, is *prima facie* privileged.³ If however the same should be so incomplete or so stated as to give a wrong impression, or, though full, if it is followed by comments containing defamatory matter, the privilege would fail, and the publisher, editor, and author would be liable for any defamation thereby spread. For example: The defendant prints a short summary of the facts of a certain case in which the plaintiff has acted as attorney. The account of the trial states that the then defendant’s counsel was extremely severe and amusing at the expense of the present plaintiff. It then sets out parts of the speech of the defendant’s counsel which contain some severe reflections on the conduct of the plaintiff as attorney in that action. The defendant is liable.⁴

But it should be clearly understood that the publication of an abridged report of a trial is privileged if it is fair and

¹ *York v. Pease*, 2 Gray, 282; *Farnsworth v. Storrs*, 5 Cush. 412. See *Holt v. Parsons*, 23 Texas, 9. Probably the language need not be legally relevant.

² *Cowley v. Pulsifer*, 137 Mass. 392.

³ See *Stevens v. Sampson*, 5 Ex. Div. 53, as to reports furnished by one not connected with the newspaper.

⁴ *Flint v. Pike*, 4 B. & C. 473.

accurate in substance, so as to convey a just impression of what took place, and is free from objectionable comments;¹ and so of the publication of proceedings in the Legislature.² It is laid down however that this privilege does not extend to the publication of papers in a cause before any proceedings have been taken upon them, as in the case of papers filed and published in vacation.³ This would not be publishing a proceeding had in open court.⁴ Reports from day to day, in the progress of a trial, may be published;⁵ and the report of a judgment alone, especially if sufficient to give a just idea of the case, may be published.⁶

Abridged reports of trials: reports from day to day.

The objection to defamatory comments applies equally well when they are put into the form of a heading to the report. For example: The defendant prints an account of a trial in which the plaintiff was involved, heading the same 'Shameful conduct of an attorney,' referring to the plaintiff. The publication is not privileged.⁷

Comments in heading.

The editor or writer may however use a heading properly indicative of the nature of the trial, if it does not amount to comment. That is, the subject of the trial may be stated. For example: The defendant prints a report of a trial under the heading 'Wilful and corrupt perjury.' But this is only a statement of the charge made against the plaintiff at the trial. There is no breach of duty to the plaintiff.⁸

¹ Turner & Sullivan, 6 Law T. n. s. 130; *Wason v. Walter*, L. R. 4 Q. B. 73, 87.

² *Wason v. Walter*, supra. Contra of matters not fit for publication. *Steele v. Brannan*, L. R. 7 C. P. 261.

³ *Cowley v. Pulsifer*, 137 Mass. 392.

⁴ *Id.* p. 394, Holmes, J.

⁵ *Lewis v. Levy*, El. B. & E. 537; *Cowley v. Pulsifer*, 137 Mass. 392, 395.

⁶ *Macdougall v. Knight*, 17 Q. B. Div. 636; 14 App. Cas. 194, 200. See this case again, 25 Q. B. Div. 1, denying the qualification suggested in the House of Lords, 14 App. Cas. at pp. 200, 203.

⁷ *Lewis v. Clement*, 3 Barn. & Ald. 702.

⁸ *Lewis v. Levy*, El. B. & E. 537.

The privilege appears to extend in England, and by the better view in this country, to the publication of *ex parte* judicial proceedings;¹ it protects the publication alike of preliminary and final proceedings in open court; and this though the tribunal declines to proceed for want of jurisdiction, for a court has jurisdiction for trying the preliminary question of its jurisdiction.²

No privilege is conferred, apart from statute, upon the proprietors, editors, or publishers of the public prints for the publication of defamatory matter uttered in the course of public meetings though held under authority of law for public purposes. For example: The defendant prints an account of a public meeting of commissioners of a town, the body acting under powers granted by statute; and the report is a fair and truthful statement of what occurred at the meeting. It however contains defamatory language uttered concerning the plaintiff at the meeting. The defendant is liable.³

It does not indeed make a case of privilege that a defamatory statement relates to a matter of great interest to the public, even though the public should be at a point of unusual anxiety on the subject. For example: The defendant charges the plaintiff in a newspaper with treachery and bad faith in regard to money received by him to obtain the manumission of a fugitive slave in whom there was great interest in the community. The publication is not privileged.⁴

It is obviously to the advantage of the public that true accounts of the proceedings of the Legislature as well as of

¹ *Usill v. Hales*, 3 C. P. D. 319; *Metcalf v. Times Publishing Co.*, 20 R. I. 674, reviewing the cases. But see *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548; *Matthews v. Beach*, 5 Sandf. 256. See *Cowley v. Pulsifer*, 137 Mass. 392; *Belo v. Wren*, 63 Texas, 686.

² *Usill v. Hales*, *supra*; *Lewis v. Levy*, *supra*.

³ *Davison v. Duncan*, 7 El. & B. 229.

⁴ *Sheckell v. Jackson*, 10 Cush. 25.

the courts should be placed before the people. Upon this principle therefore the publication of such proceedings by any one is privileged, though they contain defamatory matter; though the privilege of *non-official* publication, as in the other cases mentioned, will not cover malicious publications. Without evidence of malice however the protection is complete. For example: The defendant publishes a true report of a debate in Parliament, upon a petition presented by the plaintiff for the impeachment of a judge. Defamatory statements against the plaintiff are made in the course of the debate, and these are published with the report. The defendant is not liable in the absence of malice.¹

Any one may publish proceedings of Legislature.

Communications made to the proper² public authorities, upon occasions of seeking redress for wrongs suffered or threatened, in which the public are concerned, or in which the party making or receiving the communication is alone concerned, fall within the same kind of privilege, if believed to be true by the party seeking redress, unless the communication itself or the facts connected with it show malice. For example: The defendant honestly³ charges the plaintiff with being a thief, the charge being made before a constable acting as such, after the defendant had sent for him to take the plaintiff into custody. The defendant is not liable in the absence of evidence of actual malice.⁴

Communications asking for redress of grievances.

Upon the same principle honest statements at public meetings, as by a taxpayer and voter at a town meeting held to consider an application from the tax assessors of the town for the use of money for a particular pur-

Town meetings.

¹ *Wason v. Walter*, L. R. 4 Q. B. 73. The protection in this case was extended also to comments made in an honest and fair spirit.

² *Hebditch v. MacIlwaine*, 1894, 2 Q. B. 54, C. A.

³ 'Honestly' and 'honest' will now be used of belief that an imputation is true.

⁴ *Robinson v. May*, 2 Smith, 3.

pose, may be privileged so far as they bear upon the matter before the meeting, though they be defamatory. For example: The defendant, at a town meeting held on application of the tax assessors to consider the reimbursing the assessors for expenses incurred in defending a suit for acts done in their official capacity, honestly but falsely charges the assessors with perjury in the suit. Being a taxpayer and voter, he is not liable to any of the persons defamed, unless shown to have been actuated by malice.¹

A similar protection is extended to persons acting under the management of bodies instituted by law, and having a ^{Public bodies having special functions.} special function of care over interests of the public. While honestly acting within the limits of their function, they are *prima facie* exempt from liability for defamatory publications made. For example: The defendants, trustees of a college of pharmacy,—an institution incorporated for the purpose, among other things, of cultivating and improving pharmacy, and of making known the best methods of preparing medicines, with a view to the public welfare,—make a report to the proper officer concerning the importation of impure and adulterated drugs, falsely but honestly charging the plaintiff with having made such importations; the report being made after investigation caused by complaints made to the defendants of the importation of such drugs. The defendants are not liable unless they acted with express malice towards the plaintiff.²

The use of the public prints is sometimes justifiable to protect a person against the frauds or depredations of a private citizen; and when this is the only effectual mode of protection, persons are *prima facie* protected in adopting it even against innocent men. For example: The defendant, a baker, employing servants in deliver-

¹ *Smith v. Higgins*, 16 Gray, 251.
² *Van Wyck v. Aspinwall*, 17 N. Y. 190. See *Allbut v. General Council of Medical Education*, 23 Q. B. Div. 400.

ing bread in various towns, inserts in a newspaper published in one of the towns a card, stating that the plaintiff ‘having left my employ, and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing further to do with my business.’ The communication is honest. It is privileged in the absence of evidence of actual malice.¹

Statements made to the public in vindication of character publicly attacked are privileged, *prima facie*, if they are honest, if made through proper channels.² For example: *Self-vindication.* The defendant publishes a newspaper article containing reflections upon the plaintiff’s character, in reply to an article by the plaintiff assailing the defendant’s character. The defendant acts honestly, in defence of himself. The communication is *prima facie* privileged.³

Indeed it may not affect the case that the names of other men are drawn into the controversy and tarnished. The party attacked may in reply falsely criminate others if the charges against them are honestly made, are not malicious, and are reasonably deemed necessary for self-vindication. And such reply may be made by the party’s agent as well as by himself. For example: The defendant, an attorney, writes and publishes a letter in vindication of the character of one of his clients, in reply to certain charges of conspiracy preferred and published against the latter. The defendant’s letter contains defamatory charges against a third person, the plaintiff. The defendant is not liable if he made the charges in reasonable and honest vindication of his client’s character, and without actual malice, using terms reasonably warranted under the circumstances in which he wrote.⁴

¹ Hatch *v.* Lane, 105 Mass. 394.

² Laughton *v.* Bishop of Sodor, L. R. 4 P. C. 495.

³ O’Donoghue *v.* Hussey, Ir. R. 5 C. L. 124, Ex. Ch.

⁴ See Regina *v.* Veley, 4 Fost. & F. 1117; Seaman *v.* Netherclift, 2 C. P. Div. 53, ante, p. 304; Wason *v.* Walter, L. R. 4 Q. B. 73, ante, p. 311. These three cases taken properly together justify the example, the facts in which vary from Regina *v.* Veley, in making the imputation relate to a third person.

Communications by a master, or late master, in regard to the character or conduct of his servant, made to a neighbor or other person who is apparently thinking of employing the servant, fall within this category of cases.¹ Master and servant. For example: The defendant, having discharged his servant the plaintiff for supposed misconduct, and hearing that he was about to be engaged by a neighbor, writes a letter to his neighbor, informing him that he has discharged the plaintiff for dishonesty, and that he cannot recommend him; the charge of dishonesty being false, but believed by the defendant to be true. The defendant has a *prima facie* right to make the statement.²

The same is true where there exists a very near relationship, or a pecuniary connection of confidence, between the parties; Near relationship. as in the case of a parent admonishing his daughter against the attentions of a particular person, who is falsely charged with the commission of a crime; or of a partner advising his copartner to have no partnership dealing with another on the false ground, e. g., that he is a thief.

A confidential relation by pecuniary connection is, for the purposes of this protection, much wider than might be supposed from the case of partners last mentioned. Confidential relation. A confidential relation, within the scope of the protection to voluntary communications, probably arises wherever a continuous or temporary trust is reposed in the skill or integrity of another, or the property or pecuniary interest, in whole or in part, or the bodily custody, of one person, is placed in charge of another.³ Besides the cases above stated, this definition will cover communications made by an attorney to his client concerning third persons with whom the client is, or is about to be, engaged in business transactions;⁴

¹ *Billings v. Fairbanks*, 139 Mass. 66; *Hollenbeck v. Ristine*, 105 Iowa, 488; *Pattison v. Jones*, 8 B. & C. 578.

² *Pattison v. Jones*, *supra*.

³ See *Bigelow, Fraud*, i. 262.

⁴ See *Davis v. Reeves*, 5 Ir. C. L. 79.

communications made to an auctioneer of property concerning the sale by persons interested in the property;¹ communications of landlords to their tenants imputing immoral conduct to some of the inmates of the premises;² and many other cases of a like nature.

In most of the foregoing cases, it will be noticed, the communication was volunteered, and this of necessity; if made at all, it must have been volunteered. That fact accordingly has no bearing upon the question of liability. Indeed the most that can be said of the fact that a communication was volunteered, in a case of privilege, is that it may sometimes be taken, along with other facts, as evidence of malice.³ Alone however it would probably have no significance.

On the other hand, a communication is not necessarily privileged because of being made upon request, though very often it is privileged. If it should be unnecessarily defamatory under the circumstances, the privilege would be lost. Such fact would indeed show that the writer or speaker was actuated by malice, and would thus destroy the protection which may have been available to the party, and restore to the plaintiff his right of redress.⁴

Again, a communication made upon request is not protected unless the request come from a proper person, or at least from one whom the defendant has reason to suppose a proper person. If the defendant know, or have good reason to know, that the party making the inquiry has no interest in the matter in question other than that of curiosity, the defendant manifestly is not justified in making the communication. Even the near relatives of a person interested in the subject of the communication cannot by request afford protection to every one to publish defamation of another. For example: The de

Voluntary
communica-
tion.

Communica-
tion on re-
quest.

¹ Blackham *v.* Pugh, 2 C. B. 611.

² Knight *v.* Gibbs, 3 Nev. & M. 467.

³ See Pattison *v.* Jones, 8 B. & C. 578, 584, Bayley, J.

⁴ Fryer *v.* Kinnersley, 15 C. B. n. s. 422.

fendant, formerly but not at present, pastor of a lady, writes a letter to the lady, on request of her parents, warning her against receiving attention from a certain person, the letter containing false and defamatory accusations against him. The communication is not privileged.¹

Apart from cases of self-vindication,² the subject of *prima facie* privilege may be summed up by the following general proposition : A communication believed to be true, and made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a legal or moral duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter, which, without such privilege, would be actionable.³

Prima facie privilege accordingly rests upon duty or interest. It is then a matter of motive ; to make the occasion (*prima facie*) privileged, one must have been led — moved — by duty or interest. That is the test to which every case of the kind should be brought ; if the motive of the defendant was not duty or interest, — if for instance it was malice, — there is no ground for the privilege. To put the case in another way, if the defendant bring forward facts which show the existence of duty or interest, the question still is, whether that was in fact the motive which governed his conduct in the publication in question.

No more however is required of the defendant than evidence that he was acting from duty or interest ; it is not necessary

¹ *Joannes v. Bennett*, 5 Allen, 169. Perhaps the communication would have been privileged had it come from the lady's present pastor ; and it clearly would have been protected had it been written on request of the lady herself.

² In a case of self-vindication, the public, before which the accused seeks to vindicate himself, may have no duty or interest in the matter.

³ *Harrison v. Bush*, 5 El. & B. 344 ; *Gassett v. Gilbert*, 6 Gray, 94 ; *Joannes v. Bennett*, 5 Allen, 169 ; *Sullivan v. Stratham Co.*, 152 Mo. 268.

for him to go further and prove that he believed what he said to be true.¹ *That* will be presumed until the plaintiff shows the contrary, or proves malice, or other facts inconsistent with the alleged privilege. Indeed where the defendant is simply making report to a superior of what his duty requires him to report, such as an accusation made by another against the plaintiff, it cannot be material whether the defendant believes the accusation true or not. Enough that in good faith he reports it, as required, to his superior.² But apart from such cases,—if the defendant himself makes the accusation,—his belief in the truth of the accusation is relevant. He will indeed be presumed to believe it, but if the plaintiff shows that he does not, or otherwise proves malice, or any other fact inconsistent with the supposed privilege, the plaintiff will be entitled to recover.³

The motive of interest or duty must, as the foregoing implies, be single; a mixed motive, of interest or duty and malice (or other fact), would be fatal to the defendant.⁴ It is always laid down to be sufficient for the plaintiff to prove that the defendant acted maliciously. As for duty, that may be moral as well as legal; as for interest, that must, it seems, consist in legal right or in something of the nature of legal right.⁵ The duty or interest however must, it seems, be real; it is not enough

¹ *Jenoure v. Delmege*, 1891, A. C. 73, Privy Council. But see *Toothaker v. Conant*, 91 Maine, 438; *McNelly v. Burleigh*, id. 22. See also *Hellstern v. Katzer*, 103 Wis. 391.

² *Jenoure v. Delmege*, *supra*.

³ *Jenoure v. Delmege*, 1891, A. C. 73; *Pattison v. Jones*, 8 B. & C. 578; *Dawkins v. Paulet*, L. R. 5 Q. B. 94, 102; *Clark v. Molyneux*, 3 Q. B. Div. 237. See *Clark v. Thompson*, 90 Maine, 298; *O'Rourke v. Sun Publishing Co.*, 89 Maine, 310.

⁴ Such is the effect of *Jenoure v. Delmege*, *supra*. But qu. whether a person should lose his privilege when reporting a defamatory charge which he was *legally bound* to report, because he does not believe the charge to be true or otherwise performs his duty maliciously?

⁵ *Ante*, p. 16.

Belief of defendants making report in course of duty.

Singleness of motive: moral duty.

that the defendant supposed he had a duty or an interest, if he had not.¹

We have here, it may again be pointed out, the fact that malice as a motive has a true place in the law,² — though not in making a *prima facie* cause of the action.³ *Place of malice. Motive.* Indeed it is laid down that the malice required, when the question of privilege turns on malice, is malice in that very sense,— the popular idea of malice, as an evil motive.⁴ Accordingly, external manifestation, such as the common case of excessive zeal, is considered as *evidence* of a malicious motive, and not necessarily as malice absolute ; the effect of it being capable of being taken away by evidence consistent with zeal but inconsistent with malice. But this view may need reconsideration, if it be true that there are different ultimate forms of malice.⁵

It follows from what has been said, that no privilege is afforded the mere repetition of defamation ; and this is true *Repetition.* by the weight of authority, though the party repeating it give the name of the person from whom he received it. The repetition of the language is generally deemed actionable to the same extent, and doubtless with the same qualifications, as is the original publication.⁶

¹ *Hebditch v. MacIlwaine*, 1894, 2 Q. B. 54, C. A. But see *Jenoure v. Delmege*, 1891, A. C. 73, where the Privy Council took it for granted that belief was enough; perhaps confusing privilege itself with the subject-matter of the privilege.

² *Ante*, pp. 25–30. We have seen that privilege in one form or another is a general principle of law (*ante*, p. 302, note); accordingly malice, in the sense of a motive, is in sound theory available generally, and not merely in slander and libel, to overturn the allegation or the presumption of privilege. See *ante*, pp. 25–30. Where a man justifies by a motive, as duty or interest, it may certainly be shown that he was not governed by that but by another motive.

³ *Ante*, p. 30.

⁴ *Nevill v. Fine Arts Ins. Co.*, 1895, 2 Q. B. 156, 169, Lord Esher.

⁵ *Ante*, pp. 25–27.

⁶ *De Crespinny v. Wellesley*, 5 Bing. 392; s. c. L. C. Torts, 151; *Folwell v. Providence Journal Co.*, 19 R. I. 551; *Stevens v. Hartwell*,

For example : The defendant says to a third person concerning the plaintiff, ‘ You have heard of the rumor of his failure,’ — merely repeating a current rumor that had come to his ears that the plaintiff had failed. The defendant is liable if there was no such relation between him and the party to whom he made the communication as would cause the latter to expect a communication on such matters.¹

§ 11. CRITICISM.

Criticism cannot be defamation, unless it strikes at personal character. It is protected therefore, not because it is privileged, but because it is not defamation,² or rather because it is not wrongful. This broader ground is certainly the true one ; speaking in technical but significant language, it should not be necessary to ‘justify’ criticism. However severe it may be, however unjust in the

Distinguished
from defama-
tion.

11 Met. 542; *Sans v. Joerris*, 14 Wis. 663; *Inman v. Foster*, 8 Wend. 602. *Contra*, *Haynes v. Leland*, 29 Maine, 233. See also *Jarnigan v. Fleming*, 43 Miss. 710; *Northampton’s Case*, 12 Coke, 134.

¹ *Watkin v. Hall*, L. R. 3 Q. B. 396.

² *Merivale v. Carson*, 20 Q. B. Div. 275; *Campbell v. Spottiswood*, 3 Best & S. 769, 780. This opposes *Henwood v. Harrison*, L. R. 7 C. P. 606, 626, where, as by some of our courts, criticism is treated as privileged. But see *Thomas v. Bradbury*, 1906, 2 K. B. 627. Criticism is privileged, it seems, only in the improper sense that the act in itself is lawful, not that it is made upon an occasion which protects it. Football, every lawful act, resulting in harm, is ‘privileged’ in the same way.

The remarks of the court in *Gott v. Pulsifer*, 122 Mass. 235, 238, may need reconsideration, in failing to observe the distinction. Can malice make criticism, otherwise lawful but damaging, actionable, on the footing that it overturns ‘privilege’? Criticism, it is conceived, is lawful, as of legal right; it is in nature unlike defamation. See ante, pp. 40, 41. The better view seems to be that proof of malice may show that the comment is ‘unfair’ in the sense that it is not true criticism, not that it is libel with privilege overturned. *Thomas v. Bradbury*, 1906, 2 K. B. 627, looks like a retreat from *Merivale v. Carson* and *Campbell v. Spottiswood*, supra. Fair comment and privilege are treated in terms as different things, by the Court of Appeal, in *Plymouth Society v. Traders’ Publishing Assoc.*, 1906, 1 K. B. 403, a case of libel. Could a person be indicted for malicious criticism as libel?

opinion of men capable of judging, so long, in England at least, as the critic confines himself to what is there called ‘fair criticism’ of another’s works, the act cannot be treated as a breach of duty. But if the critic turn aside from the proper purpose of criticism, and hold up one’s character to ridicule, he becomes liable.¹

The criticism of works of art, whether painting, sculpture, monument, or architecture, falls of course within the rule. For example: The defendant says of a picture of the plaintiff, placed on exhibition, ‘It is a mere daub.’ The defendant, if fair in his criticism,² cannot be held liable to an action for defamation, however unjust the criticism.³

The conduct too of public men amenable to the public only, and of candidates for public office, is a matter proper for public discussion. It may be made the subject of hostile criticism and animadversion, so long as the writer keeps within the bounds of an honest intention to discharge a duty to the public, and does not make the occasion a mere cover for promulgating false and defamatory allegations. The question in such cases therefore is, whether the author of the statements complained of has trans-

¹ Cases in last note; *Strauss v. Francis*, 4 Fost. & F. 939 and 1107. See s. c. L. R. 1 Q. B. 379.

² See *Merivale v. Carson*, 20 Q. B. Div. 275, 280, 283, as to ‘fair comment.’ In England the question is directly put to the jury whether the comment is ‘fair;’ which is stated to mean whether, in their opinion, the comment goes beyond what any fair man, however prejudiced or strong his opinion may be, might express. *Merivale v. Carson*, at p. 280. See also *id.* at p. 283; *Thomas v. Bradbury*, 1906, 2 K. B. 627, C. A. (holding that if comments upon a matter of public interest were made in malice they could not be ‘fair’); *McGuire v. Western Morning News Co.*, 1903, 2 K. B. 100.

³ *Thompson v. Shackell, Moody & M.* 187. See *Whistler v. Ruskin*, London Times, Nov. 26, 27, 1878 (*unfair criticism*); *Merivale v. Carson*, *supra*; *Gott v. Pulsifer*, 122 Mass. 235. The recent case of *Dooling v. Budget Pub. Co.*, 144 Mass. 258, turned upon a distinction between criticism of the plaintiff in his business of caterer and slander of title. The distinction is, that if the comment, being upon property, is true it is only lawful criticism, if false it is slander of title.

gressed the bounds within which comments upon the character or conduct of a public man should be confined;— whether instead of fair comment, the occasion was made an opportunity for gratifying personal vindictiveness and hostility,¹ as by making false charges of disgraceful acts.² In a word, fair criticism or comment upon the real acts of a public man is one thing; it is ‘quite another to assert that he has been guilty of particular acts of misconduct.’³ Criticism of public men should be limited to matters touching their qualifications for the performance of the duties pertaining to the position which they hold or seek.⁴

If however an officer, or an office sought, be not subject to direct control by the public,—if the same be subordinate to the authority of some one having a power of removal over the incumbent,—then probably there exists no right to animadvert upon the conduct of such subordinate officer or candidate through public channels. For in such a case the question appears to be one of capacity or of fitness for a particular position. Though engaged in business of the public, the officer is not a ‘public man’ but a servant. The proper course to pursue in case of supposed incapacity or unfitness of the party for the position would be to state the case to the superior officer alone, and call upon him to act accordingly.⁵

Officers not
subject di-
rectly to pub-
lic control.

¹ *Campbell v. Spottiswoode*, 3 Best & S. 769, 776; *Merivale v. Carson*, 20 Q. B. Div. 275, 283.

² *Davis v. Shepstone*, 11 App. Cas. 187.

³ *Id.* at p. 190; *Austin v. Hyndman*, 119 Mich. 615; *Wilcox v. Moore*, 69 Minn. 49; *Martin v. Paine*, *id.* 482; *Wallace v. Jameson*, 179 Penn. St. 98.

⁴ Our courts differ however, or appear to differ, as to how far criticism of public men may go. See on the one hand *Hamilton v. Eno*, 81 N. Y. 116; *Root v. King*, 7 Cowen, 613; *s. c.* 4 Wend. 113; *Sweeney v. Baker*, 13 W. Va. 158; *Curtis v. Mussey*, 6 Gray, 261. On the other hand see *Palmer v. Concord*, 48 N. H. 211; *Mott v. Dawson*, 46 Iowa, 533. See also *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251. But there would probably be no dispute about the proposition of the text.

⁵ Compare *Odggers*, 223, 224.

It must be understood that the law of slander and libel applies only to defamation in pais; that is, to defamatory charges not prosecuted in a court of justice. If ^{Limits of law} of defamation. the defamation consist of an accusation prosecuted in court, the accused must seek his redress by an action for a malicious prosecution, in regard to which the right to recover depends, as has been seen, upon quite different rules of law.¹

¹ See chapter v.

CHAPTER X.

ASSAULT AND BATTERY.

Statement of the duty. A owes to B the duty not (1) to attempt with force to do hurt to his person, within reach; or (2) to hit or touch him intentionally, or recklessly as in rudeness, or in the commission of any trespass or crime.

There is so much in common in the law of the two wrongs of assault and battery, and the two are so often coincident, that the terms are frequently used without discrimination. ‘Assault’ is constantly used in the books of cases of contact, making it include ‘battery.’ But assault without contact is a wrong equally with battery; and it will be convenient and advisable to consider the two subjects separately, however similar the law in regard to them.

§ 1. ASSAULT (WITHOUT CONTACT): WHAT MUST BE PROVED, ETC.

An assault (without contact) is an attempt, real or apparent, to do hurt to another’s person, within reach. It is an *attempt* to do bodily harm, stopping short of actual execution.¹ To prove such an attempt entitles the plaintiff, *prima facie*, to recover. If the attempt be carried out by physical contact, the act becomes a battery; but the act is equally unlawful and actionable when it stops with a mere attempt to inflict hurt. It is not alone a blow that,

¹ Words are no assault; but they may be a menace and so actionable, with proof of damage. L. C. Torts, 225–227.

because of unpermitted contact with the person, is unlawful. The sensibility to danger may be intentionally shocked; and feelings so affected are within the protection of the law quite as much as the feeling produced by blows. It is actionable for A to shake his fist in the face of B.¹

In ordinary cases of assault, the question whether the defendant *actually* intended to do the bodily harm cannot, as the Intention: definition implies, enter into the case.² If reasonable fear of present bodily harm has been caused by the threatening attitude, the effect of an assault has been produced; and not even a disclaimer by the wrong-doer coincident with his act could, it seems, prevent liability. One may well complain of a man who points a pistol at one, though the man truly declare that he does not intend to shoot;³ for the ordinary effect of an assault, the intended putting one in *fear*, is produced.⁴

But an expressed purpose, or want of purpose, in a particular set of facts, may well be a determining fact in solving a doubt; that is, it may be such a part of the act in question as to turn the scales in deciding whether an assault has been

¹ Bacon's Abr. 'Assault and Battery,' A.

² But an assault cannot, it seems, be committed by negligence, so as to be actionable without proof of special damage. Compare Spade *v.* Lynn R. Co., 168 Mass. 285, 290; s. c. 172 Mass. 488. Note the difference accordingly between intended harm by attempt, and harm due to negligence. The former would instinctively call for physical redress; hence it is actionable *per se*.

³ See Reg. *v.* St. George, 9 Car. & P. 483, 493, Parke, B.; Bacon's Abr. 'Assault and Battery,' A; 1 Hawkins, P. C. 110; Pollock, Torts, 193, 2d ed., doubting Blake *v.* Barnard, 9 Car. & P. 626, 628, and Reg. *v.* James, 1 C. & K. 530. Reg. *v.* St. George, *ut supra*, 'would almost certainly be followed at this day.' Pollock, Torts, 211, 6th ed. But see Reg. *v.* Duckworth, 1892, 2 Q. B. 83.

⁴ It may not be necessary however to an assault that this effect should be produced. A person assaulted may be entirely fearless, feeling sure that the blow will not fall. Again, one may probably be assaulted in the dark without knowing it. But the putting in fear is the ordinary effect, and what *might* well put in fear is probably a test. Intent to harm is unnecessary; intent to put in fear is necessary.

committed. A denial of present purpose to do harm, or any language indicating a want of such purpose, may serve, under the circumstances, to prevent any reasonable fear of present bodily harm. If then it appear that the supposed wrong was committed in such a manner that the plaintiff must have known that no present violence was intended, the act is not an assault. For example: The defendant, on drill as a soldier, putting his hand upon his sword, says to the plaintiff, ‘If it was not drill-time, I would not take such language from you.’ This is not an assault, since the language used, under the circumstances, shows that there was no attempt, real or apparent, to do violence.¹

If however the plaintiff has reason to believe, from the defendant’s hostile attitude, that harm was intended, there is an assault, whether the defendant did or did not intend *harm*. So at least it is held for the purpose of civil redress. For example: The defendant in an angry manner points an unloaded gun at the plaintiff, and snaps it, with the apparent purpose of shooting. The gun is known by the defendant to be unloaded; but the plaintiff does not know the fact, and has no reason to suppose that it is not loaded. The defendant is liable for an assault, though he could not have intended to shoot the plaintiff.²

The parties must generally have been within reach of each other, not necessarily within arm’s reach, for an assault may be committed (as already appears) by means of a weapon or missile; and in such a case it is only necessary that the plaintiff should have been within reach of the projectile.³ And even when the alleged assault is committed with the fist, it is not necessary that the plaintiff should have been within arm’s reach of the defendant, provided the defendant was advancing to strike the plaintiff, and was restrained by others from carry-

Parties must
be within
reach of each
other : excep-
tions.

¹ See *Tuberville v. Savage*, 1 Mod. 3.

² *Beach v. Hancock*, 27 N. H. 223.

³ *Tarver v. State*, 43 Ala. 354; *State v. Taylor*, 20 Kans. 643.

ing out his purpose when almost within reach of the plaintiff. For example: The defendant advances toward the plaintiff in an angry manner, with clenched fist, saying that he will pull the plaintiff out of his chair, but is arrested by a person sitting next to the plaintiff between him and the defendant. The act is an assault, though the defendant was not near enough to strike the plaintiff.¹

In like manner if the defendant should cause the plaintiff to flee in order to escape violence, he may be guilty of an assault, though he was at no time within reach of the plaintiff; it is enough that flight or concealment becomes necessary to escape the threatened evil. For example: The defendant on horseback rides at a quick pace after the plaintiff, then walking along a foot-path. The plaintiff runs away, and escapes into a garden; at the gate of which the defendant stops on his horse, shaking his whip at the plaintiff, now beyond danger; This is an assault.²

The essential idea of an assault lies in the attempt, real or apparent, to do the harm. The attempt need not be real: enough that it reasonably appears to be real. But does this mean that the attempt need not be an attempt upon the plaintiff? A makes an assault with a pistol upon B; C who is present reasonably supposes that the assault is made upon him,—either upon him alone or upon him and B; is A liable to C? There is reason to think that he is; there is an ‘apparent attempt’ to do hurt to C, which C might reasonably find it necessary to resist. Could C be liable for assault in acting upon his belief that A was assaulting him?

It will be observed, from the statement of the duty which governs this branch of the law, that a mere assault is a civil offence; and hence the person assaulted has a right of action, though he may not have suffered any loss or detriment from the offence. In such a case how-

¹ Stephens v. Myers, 4 Car. & P. 349; s. c. L. C. Torts, 217.

² Mortin v. Shoppee, 3 Car. & P. 373.

ever, unless the assault was outrageous, he could probably recover only nominal damages.¹

§ 2. BATTERY: WHAT MUST BE PROVED, ETC.

A battery consists in the unpermitted application of force by one man to the person of another. Proof of such fact is enough to make a *prima facie* case. A battery therefore is mainly distinguishable from an assault and battery. ^{Definition: distinction between assault and battery.} in the fact that physical contact is necessary to accomplish it. But there is a deeper distinction; for contact, though making a battery, is unnecessary to liability, as we have seen. The deeper distinction is that a battery may be committed upon a man who was not assaulted, that is, upon one who, but for the contact, might have no right of action. A battery is not an application of force by way of an attempt to do hurt to the plaintiff's person; it is only an unpermitted application of force to the plaintiff's person. A different element enters into the definition of an assault. A man shoots at a mark, in a highway, contrary to law and hits a person he did not see or suppose to be present. That, it seems, would be a battery, though there was no assault upon any one. Boys fire off a cannon in the highway, in violation of law; the cannon explodes and a piece of it hits the plaintiff; that would be a battery, though there was no assault. Battery is then a distinct kind of wrong and calls for treatment accordingly.

Turning now to the subject of contact, it should be stated that this need not be effected by a blow; any forcible contact may be sufficient. For example: The defendant, an overseer of the poor, cuts off the hair of the plaintiff, an inmate in the poor-house, contrary to the plaintiff's will, and without authority of law. This is a battery, and the defendant is liable in damages.² Again: The defendant, in passing through a

¹ The damages recovered in *Stephens v. Myers*, *supra*, were one shilling.

² *Forde v. Skinner*, 4 Car. & P. 239.

crowded hall, pushes his way in a rude manner against the plaintiff. This is also a battery.¹

It is not necessary that the defendant should come in contact with the plaintiff's body. It is sufficient if the blow or touch come upon the plaintiff's clothing. For example: The defendant, in anger or rudeness knocks off the plaintiff's hat. This is enough to constitute a battery.²

Indeed it is not necessary that the plaintiff's body or clothing be touched. To knock a thing out of the plaintiff's hands, such as a staff or cane, would clearly be a battery; and the same would be true of the striking a thing upon which he is resting for support, at least if this cause to the plaintiff a fall or concussion. For example: The defendant strikes or kicks a horse upon which the plaintiff is riding, or a horse hitched to a wagon in which the plaintiff is riding. This is a battery.³ Again: The defendant drives a vehicle against the plaintiff's carriage, throwing the plaintiff from his seat. This also is a battery.⁴ Again: The defendant runs against and overturns a chair in which the plaintiff is sitting. This too is a battery.⁵

What has already been said shows that it is not necessary to constitute a battery that the touch or blow or other contact should come directly from the defendant's person. Indeed a battery may be committed at any distance between the parties if only some violence be done to the plaintiff's person. Hitting one with a stone or other missile is no less a battery than striking one with the fist. It is not necessary even that the object cast should do physical harm; the battery consists in the unpermitted contact, not in

¹ Cole *v.* Turner, 6 Mod. 149; s. c. L. C. Torts, 218.

² Addison, Torts, 571 (4th ed.).

³ Clark *v.* Downing, 55 Vt. 259; Dodwell *v.* Burford, 1 Mod. 24. Probably it would not be necessary that the plaintiff should be thrown from the horse or thrown against anything.

⁴ Hopper *v.* Reeve, 7 Taunt. 698.

⁵ Id. It was held immaterial in this case whether the chair or carriage belonged to the plaintiff or not.

the damage. For example: The defendant spits or throws water upon the plaintiff. This is a battery, though no harm be done.¹

In earlier times it appears to have been considered that a battery might be committed merely by negligence. For example: The defendant, a soldier, handles his arms so carelessly in drilling as to hit the plaintiff with them. This is deemed a battery, though the act was not intended.² The above-mentioned case of

Whether neg-
ligence can
constitute a
battery.

the running into the plaintiff's carriage might be another example.³ But there is reason to doubt whether cases short of actual or virtual intention, or recklessness, would now be actionable without proof of damage; which makes the distinction between cases of assault or battery and bodily injury by negligence. A rowdy might terrorize a whole neighborhood if damage had to be proved for an assault or a battery, a ground of liability having no application to negligence.

But a person may be guilty of a battery where his act is directly caused by another person, provided the defendant was at the time committing a crime or a trespass. For example: The defendant, when about to discharge a gun unlawfully at a third person, is jostled just as the gun is fired, and the direction of the shot is changed so as to cause the plaintiff to be hit. This is a battery.⁴

Plaintiff not
the person in-
tended.

¹ See *Regina v. Cotesworth*, 6 Mod. 172; *Pursell v. Horn*, 8 Ad. & E. 602. A word of explanation is necessary as to the latter case. The plaintiff had sued for a battery by throwing of water on him, and had failed to prove it, though he proved certain consequential injuries, and had a verdict for below forty shillings. The damages not reaching forty shillings, and a battery not having been proved, the plaintiff was not entitled (under the statute) to the costs given him. He now attempted to show that he had not sued for a battery at all, or, if he had, that a battery had been admitted by the defendant's plea; which, if true, would save him his costs as given by the jury. But the court decided against him, and cut down the costs allowed; thus holding that to throw water upon a person is a battery.

² *Weaver v. Ward*, Hob. 134. See *Holmes v. Mather*, L. R. 10 Ex. 261.

³ See also *Hall v. Fearnley*, 3 Q. B. 919.

⁴ See *James v. Campbell*, 5 Car. & P. 372, where the defendant, in fighting with another, hit the plaintiff with his fist.

Indeed in former times every blow which immediately resulted from an intended act seems to have been looked upon as a battery,¹ in accordance with the general idea, based upon social conditions of that time, that if a man suffered harm at the hands of another, the latter must justify if he could. The modern authorities strongly tend to a different view. There is no *battery*, according to the modern view, unless the blow itself was intentional or reckless, or unless the defendant was otherwise conducting himself as a trespasser at the time.² No man when doing that which is rightful would now be held liable for consequences which he could not prevent by prudence or care, though another suffer bodily or other harm thereby. Modern theory, based upon its own social and economic conditions, makes it more difficult to prove that the defendant in such cases has done a wrongful act.³ For example: The defendant's horse, upon which the defendant is lawfully riding in the highway, takes a sudden fright, runs away with his rider, and against all the efforts of the defendant to restrain him, runs against and hurts the plaintiff. This is not a battery or other breach of duty.⁴ Again: The defendant, walking near the plaintiff, suddenly turns round, and in so doing hits the plaintiff with his elbow. This is not a battery.⁵

¹ See Year Book, 21 Hen. 7, 28; *Lambert v. Bussey*, T. Raym. 421; *Weaver v. Ward*, *supra*.

² *Coward v. Baddeley*, 4 H. & N. 478, *Martin, B., infra*; *Holmes v. Mather*, L. R. 10 Ex. 261; *Wakeman v. Robinson*, 1 Bing. 213; *Hall v. Fearnley*, 3 Q. B. 919; *Brown v. Kendall*, 6 Cush. 292; *Vincent v. Stinehour*, 7 Vt. 62; *Nitroglycerine Case*, 15 Wall. 524. See *Spade v. Lynn R. Co.*, 172 Mass. 488; *s. c.* 168 Mass. 285. The old cases have fairly ceased to be law, both in England and in America.

³ *Brown v. Kendall*, 6 Cush. 292; *Stanley v. Powell*, 1891, 1 Q. B. 86; Green Bag for January, 1906, p. 18, in an admirable article on The Modern Conception of Animus, by Brooks Adams, Esq., showing how steadily the advance has been in favoring the defendant, under the influence of social change.

⁴ See *Vincent v. Stinehour*, 7 Vt. 62, and example cited by Williams, C. J.; and see *Holmes v. Mather*, *supra*, a still stronger case.

⁵ A case put by *Martin, B.*, on the argument in *Coward v. Baddeley*,

Nor is there necessarily a right of action though (not merely the general action of the defendant, as in the last example, but) the specific act of contact be intentional, for it may have been done in sport or play; though sport could doubtless be carried to such an extreme as to create liability. It is not even a decisive test, always, to inquire whether the act was done against the plaintiff's will. The plaintiff may be engaged in criminal conduct at the time; or he may be lying, unconsciously, in an exposed condition; or with the best of intentions he may be doing that which the defendant rightly thinks dangerous to life or property. In the first of these cases, an arrest of the plaintiff by laying on of hands will be justifiable; in the second case, an arousing or removing of him will be proper; in the third, the laying on of hands to attract his attention is lawful.¹ In none of these cases is there liability, though the contact be against the will of the plaintiff.² If however the act were done in a *hostile* manner, the case would be different.³

A battery may be committed in an endeavor to take one's own property from the wrongful possession of another. If the party in possession should refuse to give up the property, the owner should resort to the courts to obtain it, or await an opportunity to get possession of it in a peaceful manner. He has no right to take it out of the hands of the possessor by force. For example: The defendant, finding the plaintiff in wrongful possession of the former's horse, beats the plaintiff, after a demand and refusal to give up the animal, and wrests the horse from the plaintiff's possession. This is a battery.⁴

¹ H. & N. 478. See *Brown v. Kendall*, 6 CUSH. 292; *Holmes v. Mather*, supra; *Stanley v. Powell*, supra; *Holmes*, Common Law, 105, 106.

Taking one's
own property
from another.

² As to the last case, see *Coward v. Baddeley*, supra.

³ These however are properly cases of justification; the justification accompanies what otherwise would be actionable.

⁴ *Coward v. Baddeley*, supra.

⁴ *Andre v. Johnson*, 6 Blackf. 375. See *Suggs v. Anderson*, 12 Ga. 461. But the defendant could keep his horse. *Scribner v. Beach*, 4 Denio, 448, 451.

Blow in play:
other justifi-
able cases.

**§ 3. JUSTIFIABLE ASSAULT: SELF-DEFENCE: 'SON
ASSAULT DEMESNE.'**

There are a few cases, survivals of the past, in which a man is entitled to take the law into his own hands and inflict corporal injury upon another. Among those to be noticed are the right of a parent to give moderate correction to his minor child ; the (probable) right of a guardian to do the like to a minor ward placed in his family ; the right of a schoolmaster (when not prohibited by law or school ordinance) to do the like to his scholars ;¹ the (possible) right of a master to do the like to young servants ; and the right of officers of reform, discipline, or correction to do the like towards the refractory who have been committed to their charge.

Aside from these and similar cases, the right to do that which would otherwise amount to an assault or a battery is confined to two or three cases, all of which are justified on grounds either of self-defence or on the ground that the plaintiff really caused the act of which he complains. In the language of the old law the wrong complained of by the plaintiff was 'son assault demesne.' A person cannot be liable for an act which he himself has not committed or caused, either personally or by another authorized to act for him. Hence if the plaintiff himself caused the act complained of, the defendant cannot be liable to him for it.

The chief case to be noticed in which the justification of 'son assault demesne' is allowed is self-defence. Wherever it has become apparently necessary for a man assaulted to repel force by force, he may do so.²

¹ See *Sheehan v. Sturges*, 53 Conn. 481; *Hathaway v. Rice*, 19 Vt. 102; *Commonwealth v. Randall*, 4 Gray, 36; *Cooper v. McJunkin*, 4 Ind. 290; *Fertich v. Michener*, 111 Ind. 472.

² *Drew v. Comstock*, 57 Mich. 176; *Miller v. State*, 74 Ind. 1. The difficulty is in determining when it is apparently necessary to do the thing complained of, and when one may strike or shoot without first 'retreat-

Indeed the right of self-defence extends to the use of physical force for the protection of property as well as of the person of the defendant, provided the property be at the time in the defendant's possession. No one has a right, except under authority of law, to seize upon the property of which the owner is in possession ; to do so is to take the risk of bodily violence. For example : The plaintiff, a creditor of the defendant, seizes the defendant's horses (which the latter is using) for the purpose of obtaining satisfaction of his debt. The defendant resists and strikes the plaintiff. He is not liable if he did not exceed the bounds of defence.¹

If the owner or person entitled to possession was out of possession at the time of committing the alleged assault or battery, he will not be permitted to say, by way of defence, that the plaintiff caused the assault by having previously taken wrongful possession, or by having wrongfully detained the defendant's property. Such is not a case of son assault demesne, as the example already given of the horse taken from the plaintiff's possession by violence shows.²

And though a trespasser should make an assault upon the owner of property, and seek to take it out of the owner's possession, the owner is allowed to use no greater force in resisting the unlawful act than may be necessary for the defence of his possession.³ If he should reply to the trespasser's attempt with a force out of proportion to the provocation, the act would then be his own battery, and not the

ing to the wall.' See *Howland v. Day*, 56 Vt. 318; *Haynes v. State*, 17 Ga. 465; *State v. Dixon*, 75 N. Car. 275; *Coooley, Torts*, 190, 2d ed. Retreat cannot be required where action upon the instant appears to be necessary for self-protection. See *Beard v. United States*, 158 U. S. 550; *Page v. State*, 40 N. E. Rep. 745 (Ind.).

¹ See *Cluff v. Mutual Ben. Life Ins. Co.*, 13 Allen, 308; s. c. 99 Mass. 317; *Scribner v. Beach*, 4 Denio, 448; *Richards v. Heger*, 99 S. W. Rep. 802 (Mo.).

² *Ante*, p. 331.

³ The allowable force in such a case is expressed by the words of the old pleading, ' *molliter manus imposuit*' — the defendant gently laid his hands upon the plaintiff.

plaintiff's; or again, in the technical language of the old pleading, the plaintiff could then reply to the defendant's plea of son assault demesne, that the tort was 'de injuria sua propria,' — the defendant's own wrong. For example: The defendant, owner of a rake which is in his own hands, knocks the plaintiff down with his fist, upon the plaintiff's taking hold of the rake to get possession of it. The defendant is liable.¹ Again: the defendant strikes the plaintiff repeated blows, knocking her down several times, upon her refusal to quit the defendant's house. The plaintiff is entitled to recover.²

Nor is it lawful for the owner of property, in defence of his possession, to make an attack upon the trespasser without first calling upon him to desist from his unlawful purpose, unless the trespasser is at the time exercising violence. In the example last given, the defendant would have been liable for a mere hostile touch had he not first requested the plaintiff to leave his premises; unless she had entered his premises forcibly.³

In the next place it is to be observed that a person may not only make reasonable defence of his own person, and of the possession of his own property; he may do the same towards the members of his own family when attacked,⁴ and perhaps also towards the inmates of a house in which he is then receiving hospitality. Certain it is that a servant may justify a battery as committed in defence of his master;⁵ that is, he may do anything in his master's defence which his master himself might do. And on the other hand, notwithstanding some doubts in the books, a master may justify a battery as committed in defence of his servant. For example: The plaintiff attacks the defendant's servant, whereupon the defendant as-

¹ *Scribner v. Beach*, 4 Denio, 448.

² *Gregory v. Hill*, 8 T. R. 299.

³ See *Scribner v. Beach*, 4 Denio, 448.

⁴ *Black. Com. i.* 429.

⁵ *Reeve, Domestic Rel.* 538 (3d ed.).

sists his servant to the extent of repelling the attack, and no further. The defendant is not liable.¹

A person may also justify the use of a proper amount of physical force as rendered in quelling a riot or an affray, at the instance of a constable or other officer of the ^{Quelling riot.} peace,² or perhaps of his own motion when no officer is present.

§ 4. VIOLENCE TO OR TOWARDS ONE'S SERVANTS.

It will have been observed that a double breach of duty may be committed by the same assault or battery; one to the person to whom the violence is done, and, where such person is a servant or a child of the plaintiff, another ^{Double breach of duty.} breach to the person whom he or she was serving or assisting. It follows that each has a right of action against the wrong-doer in respect of the breach of his own individual right; the servant or child for the violence (that is, for the assault or battery) and its proper consequences, and the master or parent for the loss of service or assistance.³

There will be this difference however between the rights of action of the master and the servant (using these terms generically), that the latter will be entitled to recover judgment for the mere assault and battery, though no damage were actually inflicted; while the former will be entitled to judgment only in case he can prove either (1) that the violence committed was such as to disable the person who sustained it from rendering the amount of aid which he or she was able to render before the act complained of; or (2) that such person was, by reason of the violence, caused to depart from or abandon the service or

<sup>Distinction be-
tween mas-
ter's action
and servant's.</sup>

¹ *Tickell v. Read, Lofft*, 215.

² *Year Book*, 19 Hen. 6, pp. 43, 56; *L. C. Torts*, 270.

³ The relation of parent and child is for such purpose the relation of master and servant. That never was true of the relation of husband and wife; but whether the husband could recover alone for a battery committed upon his wife without proving special damage, quare?

abode of the plaintiff.¹ That is, the master must have sustained an actual damage;² but if he has thus been injured, he is entitled to recover therefor, even though the defendant's act consisted only in violent demonstrations. For example: The defendants, by menaces and angry demonstrations against the plaintiff's servants, cause them to leave and abandon the plaintiff's service. The defendants are liable; though no bodily violence was committed upon the servants.³

The plaintiff must either have been entitled to require the services of the party assaulted or beaten, or he must have been in the actual enjoyment of them, if they were gratuitous. A *parent* cannot maintain an action for an assault or a battery committed upon his child after the child's majority, unless he or she was then actually in the parent's service; nor could the parent maintain an action for such an injury committed upon his child during the child's minority, if the parent had in any way divested himself of the right to require his child's services.⁴

Some qualification of a master's right of action seems to be required when the loss of service caused by the assault was only an accidental or unexpected effect of the contract. Upon that idea it appears to have been laid down that if in the course of performing a contract between the defendant and the plaintiff's servant, the defendant commit a battery upon the servant, which battery incidentally works a breach of the terms of the contract, the plaintiff has

¹ The authorities upon this subject are mostly ancient, but the law remains unchanged. See L. C. Torts, 226, 227.

² In the case of an assault or battery upon one's wife, the husband at common law joined in the action; but the real *right of action* lay in the wife. And in times of servitude the master could, it seems, sue in trespass for an assault or battery committed upon his villein, even though the former sustained no damage. L. C. Torts, 227.

³ Year Book, 20 Hen. 7, p. 5; L. C. Torts, 226.

⁴ Questions of this sort have generally arisen in actions for seduction. See ante, pp. 270-272.

no right of action for the loss of service following. For example: The defendants, common carriers of passengers, are paid by the plaintiff's servant for safe passage from A to B. On the way the servant is assaulted, bruised, and injured by servants acting for the defendants, the defendants thus failing to carry the servant safely according to their agreement; whereby the plaintiff loses the injured person's service for a period of nineteen weeks. The plaintiff is not entitled to recover; the injury being deemed to be a breach of duty to the servant alone.¹

By the common law, rights of civil action for injuries done to the person (and indeed all rights of action *ex delicto*, except for the wrongful taking or detention of property and like acts²) cease with the death of the party injured or of the wrongdoer. ‘*Actio personalis moritur cum persona.*’ And this rule, though not without strong doubts, has been held to apply to actions by masters

¹ Compare *Alton v. Midland Ry.*, 19 C. B. n. s. 213; s. c. 15 Jur. n. s. 672; *Fairmount Ry. Co. v. Stutler*, 54 Penn. St. 375. See *Taylor v. Manchester Ry. Co.*, 1895, 1 Q. B. 134, 140; *id.* 944; *Harvard Law Rev.*, Nov. 1895, p. 215; *ante*, pp. 190-192.

The contract-duty may or may not be the only duty in the case. If I buy a gun for myself only, the contract-duty of the seller in regard to the proper making of the gun is to me alone. See *Meux v. Great Eastern Ry. Co.*, 1895, 2 Q. B. 387, 390. But if the seller understands that the rights of another are involved,—that another also is to use the gun,—then there is a duty to that person as well as to me. *Langridge v. Levy*, 2 M. & W. 519; s. c. 4 M. & W. 338, Exch. Ch. See also *Thomas v. Winchester*, 6 N. Y. 397. The real reason then for the decision in the example of the text appears to be, that the defendant did not know of the rights of any one but the servant. Duty imports observed or observable danger. *Ante*, pp. 36, 37.

² *Ante*, pp. 64-66. See *Phillips v. Homfray*, 24 Ch. Div. 439; also the early statutes, 4 Edw. 3, c. 7, 25 Edw. 3, st. 5, c. 5, and the modern one, 3 & 4 Wm. 4, c. 42; *Pollock, Torts*, 59, 2d ed. And Lord Campbell’s Act, 9 & 10 Vict. c. 93, copied very widely in this country, with slight changes, gives a right of action to the personal representative ‘for the benefit of the wife, husband, parent, and child of the person’ killed. See *Seward v. The Vera Cruz*, 10 App. Cas. 59 (overruling *The Francouia*, 2 P. D. 163); *Pym v. Great Northern Ry. Co.*, 4 Best & S. 396, Ex. Ch.; *Bulmer v. Bulmer*, 25 Ch. D. 409.

for the killing of their servants.¹ The rule that the action dies with the death of either party permits however an action by the master for damages between the time of the injury of the servant and his death, where death was not immediate.²

¹ *Osborn v. Gillett*, L. R. 8 Ex. 88, Bramwell, B., dissenting strongly; *Clark v. London Omnibus Co.*, 1906, 2 K. B. 648, C. A.

² *Baker v. Bolton*, 1 Camp. 493; *Osborn v. Gillett*, L. R. 8 Ex. 88, 90, 98; *Clark v. London Omnibus Co.*, supra; *Sullivan v. Union Pacific R. Co.*, 1 Cent. L. J. 595. See also *Insurance Co. v. Brame*, 95 U. S. 754; 2 Southern Law Rev. n. s. 186; *Harvard Law Rev.*, Dec. 1900, pp. 290, 291.

CHAPTER XI.

FALSE IMPRISONMENT.

Statement of the duty. A owes to B the duty not to impose a total restraint upon B's freedom of locomotion.

The terms 'writ,' 'warrant,' 'precept,' and 'process' are, in this chapter, used as equivalents, wherever it is not necessary to distinguish them.

The term 'irregular,' as applied to a writ, refers to some improper practice on the part of the person who obtains the writ, as distinguished from 'error,' in decision.¹ A writ is sometimes absolutely void for irregularity,² sometimes only voidable.

By comparatively recent statutes, arrest in civil suits has been prohibited, except in a few special cases,³ so that the particular facts of many of the older authorities no longer appear; but the grounds upon which they rested have not been changed.

§ 1. THE NATURE OF THE RESTRAINT: WHAT MUST BE PROVED, ETC.

A false imprisonment consists in the total, or substantially total, restraint of a man's freedom of locomotion.⁴ Proof of

¹ See *Everett v. Henderson*, 146 Mass. 89.

² As a writ in execution of a judgment which has been discharged to the knowledge of the person suing out the same. *Deyo v. Van Valkenburgh*, 5 Hill, 242.

³ See e. g. Mass. Pub. Stats. c. 162, §§ 1-3.

⁴ *Bird v. Jones*, 7 Q. B. 742, 752.

such restraint will make a *prima facie* case. The act may be committed not only by placing a man within prison walls, but also by restraint imposed upon him **Definition.** in his own house or room, or in the highway, or even in an open field.¹

Any general restraint is sufficient to constitute an imprisonment; and though this be effected without actual contact **Contact.** of the person, it will be presumptively actionable.

Any demonstration of physical power which, to all appearance, can be avoided only by submission, operates as effectually to constitute an imprisonment, if submitted to, as if any amount of force had been exercised. For example: The defendant, an officer, says to the plaintiff, 'I want you to go along with me,' with a show of authority, or of determination to compel the plaintiff to go. This is an imprisonment, though the defendant do not touch the plaintiff.²

A person may also be imprisoned, though he had not the full power of locomotion before the restraint was imposed.

Power of movement. It appears to be sufficient if his will has been so overcome that he would not attempt to escape the restraint if he had the physical ability of locomotion. For example: The defendant, a creditor of the plaintiff, goes with an officer to the plaintiff's house, in order to compel him to give security for or make payment of his debt, which is not due. The plaintiff is found sick in bed; whereupon the officer tells him that they have not come to take him, but to get a certain article of property belonging to the plaintiff, though, if he will not deliver that or give security, they must take him or leave some one in charge of him. The plaintiff, much alarmed, gives up the article. This is an imprisonment.³

The submission therefore to the threatened and reasonably apprehended use of force is not to be considered as a consent

¹ Lib. Ass. (22 Edw. 3), p. 104, pl. 85.

² Brushaber *v.* Stegemann, 22 Mich. 266, 268. See Hill *v.* Taylor, 50 Mich. 549.

³ Grainger *v.* Hill, 4 Bing. N. C. 212.

to the restraint, within a maxim which has frequent application in the law of torts, ‘volenti non fit injuria.’ And the imprisonment continues until the party is allowed to depart, and is involuntary until all general restraint ceases, and the means of effecting it are removed.¹

It is not enough that restraint is imposed upon one’s freedom of proceeding in a particular desired direction. The detention must be such as to cause escape in any ^{Circumscribing} direction to amount to a breach of the restraint; ^{restraint.} the restraint should be circumscribing, except perhaps where the only place of escape is an almost impassable one. For example: The defendant, an officer, stationed at a particular point to prevent persons from passing in a certain direction, restrains the plaintiff from passing that way, but leaves another way open to him, of which however he does not wish to avail himself; and thus detained the plaintiff stands there for some time. This is not an imprisonment.²

It follows from the last proposition, and from what had been stated before, that a person detained within walls is none the less imprisoned by reason of the fact <sup>Prison walls
not necessary.</sup> that he may make an escape through an unfastened window or door; since such an act would be a breach of the restraint. If it would not be, there is no imprisonment; supposing that the unfastened door or window affords a ready means of escape.

§ 2. DEFENCE: ARREST WITH WARRANT.

Supposing the restraint imposed to amount to an imprisonment, it is proper next to consider how the *prima facie* right

¹ *Johnson v. Tompkins*, Baldw. 571, 602.

² *Bird v. Jones*, 7 Q. B. 742. ‘A prison may have its boundary large or narrow, invisible or tangible, actual or real, or indeed in conception only; it may in itself be movable or fixed; but a boundary it must have, and from that boundary the party imprisoned must be prevented from escaping; he must be prevented from leaving that place within the limit of which the party imprisoned could be confined.’ *Id.* Coleridge, J.

of action for such an act can be overturned. How is it to be shown that the imprisonment was not unlawful? In other words, how is the act, in technical language, to be justified? This may be done in several ways, all of which however will be passed over except such as relate to the administration of justice. Of justifications of that kind the most common and the most important arises where an officer has made an arrest under a lawful warrant of a court of justice.¹ This will now be taken for special consideration. Arrests without warrant by officers or by private citizens will follow in a distinct section.

It is to be observed at the outset that the officer, in executing his process, must arrest the person named in it. If he do not, though the arrest of the wrong person was made through mere mistake, it may be a case of false imprisonment. And this appears to be true, though the party arrested bear the same name as the party against whom the writ is directed. For example: The defendant, a constable, asks the plaintiff if his name is J. D., to which the plaintiff replies in the affirmative; whereupon the defendant takes the plaintiff into custody, the plaintiff not being the person intended by the writ. This is a case of false imprisonment.²

If however the plaintiff, though not the person intended by the process, should do anything to mislead the officer, and cause the latter to believe that the former was the person meant by the precept, the officer commits no breach of duty in making the arrest. The plaintiff's action is a consent, and something more. For example: The defendant, a sheriff, arrests the plaintiff under process of court, upon a representation made by her that she was E. M. D., and the person against whom the writ had issued; with the intention of procuring the defendant to arrest her under his writ. The

¹ Chambers v. Oehler, 107 Iowa, 155. See ante, p. 339, of arrests in civil suits.

² Coote v. Lighworth, F. Moore, 457. It is to be noticed that the plaintiff in this case did nothing to induce the officer to arrest him as the person intended.

defendant, believing the representation to be true, makes the arrest. This is not a breach of duty.¹

The officer's process however should so describe the person to be arrested that he may know whom to arrest; or, rather, that a person whom he proposes to arrest may ^{Description of} know whether to resist or submit. If the warrant ^{person.} be defective in this particular, the officer acts at his peril in serving it; and he will be liable to any one whom he may arrest under it. For example: The defendant, a constable, arrests the plaintiff under a warrant reciting the commission of a felony by John R. M., and then commanding the officer to arrest the said *William* M. The defendant is liable for false imprisonment, though the plaintiff is the person intended.²

It follows that the officer may be liable if there be a misnomer in the warrant of the person intended, though the person actually meant was arrested, and that too ^{Misnomer.} (in other respects) on legal grounds. For example: The defendants cause the plaintiff, whose name is Eve-line, to be arrested under the name of Emeline in the warrant. This is a breach of duty, though the plaintiff, in her proper name, was legally liable to such an arrest.³ But the case would have been different had the plaintiff been known alike by either name.⁴

The officer also loses the protection of his warrant if he fails to act in accordance with the duty enjoined by it. He must follow the tenor of his process, and not surpass his authority. For example: The defendant ^{Tenor of} arrests the plaintiff beyond the precincts named ^{process to be followed.} in the warrant. This is a false imprisonment.⁵

¹ *Dunston v. Paterson*, 2 C. B. n. s. 495. The sheriff however had detained the plaintiff improperly after discovering his mistake, and for this he was held liable.

² *Miller v. Foley*, 28 Barb. 630.

³ *Scott v. Ely*, 4 Wend. 555.

⁴ *Griswold v. Sedgwick*, 1 Wend. 126.

⁵ This is too fundamental to have been much agitated in the courts. No authority is needed for the example.

It is further to be noticed that, though the process and arrest be valid, the protection of the officer may be lost by oppressive conduct. For example: The defendant, charged with a warrant simply to take the body of the plaintiff, unites with the person at whose instance the arrest is made in illegally extorting money from the plaintiff by working upon his fears. The defendant is liable for a false imprisonment.¹

The officer's protection will not extend to any detention after the warrant has expired. The warrant, however valid at first, will not justify such an act. If the officer ^{Detention after process has expired.} has reason for holding the prisoner after the expiration of the warrant, he must procure new process. He can hold the prisoner only for a reasonable time before his examination; after that time, the warrant loses its vitality. For example: The defendant arrests the plaintiff, and takes him before a magistrate on a charge of larceny, detaining him for a period of three days, in order that the party whose goods had been stolen might have an opportunity to collect his witnesses and prove the crime. This is a false imprisonment, the detention being unreasonable.²

When an arrest has been made upon a valid warrant, the officer may detain the prisoner on any number of other valid warrants which he has at the time, or which may afterwards, during the detention, reach him. But if the officer makes the arrest on void process, or in an otherwise illegal manner, he has no right to detain the party on any valid process which may be in his hands; for the officer, upon a principle elsewhere stated, cannot avail himself of a custody effected by

¹ *Holley v. Mix*, 3 Wend. 350. In such a case the process appears to be used as a mere subterfuge to cover an unlawful purpose and act. Hence it is that not merely the subsequent act but the arrest itself is unlawful. See post, pp. 384, 385, for the distinctions; *Grainger v. Hill*, 4 Bing. N. C. 212.

² *Wright v. Court*, 4 B. & C. 596. The prisoner should have been taken before a magistrate at once.

illegal means to execute valid process.¹ The prisoner should first be permitted to go at large, and then arrested under the valid warrant. For example: The defendant improperly arrests the plaintiff without a warrant, and while holding him in custody delivers him to an officer. The defendant afterwards receives a valid warrant for the plaintiff's arrest from an officer who held it at the time of the arrest. The plaintiff has a right of action for a false imprisonment.²

The principle to be derived from the cases (to restate this important doctrine in the language of the courts) is then that where the officer legally arrests the party in one action, the arrest operates virtually as an arrest in all the actions in which the officer holds valid writs against him at the time; for it would be an idle ceremony to arrest the party in the other cases. And this detainer will hold good, though the court may, upon collateral grounds, unconnected with the act of the officer, order the party to be discharged from the first arrest. But where the officer has illegally arrested the party, he is not in custody under the first warrant, but is suffering a false imprisonment; and such false imprisonment, being no arrest in the original action, cannot operate as an arrest under the other warrants in the officer's hands.³

It is important, in the next place, to inquire into the right of an officer to retake a prisoner under the original warrant, after an escape. It is clear that if the escape was Recapture. made without the consent of the officer, while the writ was still in force, that is, not fully executed, the prisoner may be retaken on the old warrant, without rendering the officer liable to an action for false imprisonment. In case of an escape permitted by the officer, his right of retaking on the old writ will depend on the nature of the case. When, in civil cases, an arrest is proper, an officer who has arrested a man may, it seems, retake him before the return of the process,

¹ *Hooper v. Lane*, 6 H. L. Cas. 443. ² *Barratt v. Price*, 9 Bing. 566.

³ *Tindal*, C. J., in *Barratt v. Price*, and *Williams*, J., in *Hooper v. Lane*, supra.

though he voluntarily permitted him to escape immediately after the arrest. So at all events it was held under the old law. For example: The defendant arrests the plaintiff in civil process, and on the following day releases him upon the latter's request. Two days afterwards, the defendant rearrests the plaintiff on the old process and commits him to jail, where he remains until he gives bail; the old process not being yet returnable (that is, being still in force). This is not a breach of duty on the part of the officer.¹

In regard to criminal cases, there has been some conflict of authority concerning the right to take the prisoner without new process. It has sometimes been decided that the prisoner may be so retaken.² In later decisions, this doctrine has been denied to be law, except in so far as it may apply to the case of a prisoner who, after escape from jail,³ has returned and given himself into the custody of the officer; in that case the prisoner can be detained under the old warrant.⁴ And this appears to be the true rule and distinction. For example: The defendant, an officer of the peace, clothed with a warrant to arrest the plaintiff upon a charge of larceny, executes the same upon her, and takes her before a justice of the peace, who receives her recognizance to appear for trial at another court upon a certain day. She is then discharged from arrest. No court is held at the place and time stated. Afterwards the defendant rearrests her upon the old warrant, and takes her before another magistrate. This is a false imprisonment.⁵

An arrest made under a void writ will generally render the officer, as has already been stated, liable to an action for false

¹ *Atkinson v. Matteson*, 2 T. R. 172.

² *Clark v. Cleveland*, 6 Hill, 344. In this case, the prisoner had been let to bail in the wrong county, and then released from custody; and, in an action by him for malicious prosecution, it was held that the plaintiff was still liable to arrest under the original warrant, and that therefore, the proceedings not being terminated, the action could not be maintained.

³ That is, after the warrant has been executed.

⁴ *Doyle v. Russell*, 30 Barb. 300.

⁵ *Id.*

imprisonment. But in order to subject him to such liability, the writ must have been void on its face ; that is, of no more validity than waste paper. If it be voidable merely, or if, though void, the fact does not appear on the ^{Void process.} face of the process, especially if the officer does not know that the process is void, it will afford a protection to the person who serves it.¹

Now a writ will be void on its face (1) if it be materially defective in language ; an example of which may be seen in the case above stated, where the writ failed to ^{When process is void.} show who was intended.

A writ will be void on its face (2) if the whole proceeding in which it was issued was beyond the jurisdiction of the court granting it. For example : The defendant executes a warrant against the plaintiff for the collection of road taxes ; the warrant being issued by a justice of the peace who has no authority over such taxes. The writ is void, and the defendant is liable for false imprisonment.²

A writ will be void on its face (3) where the court, though having jurisdiction over the subject-matter of a proceeding, has no authority to institute suit by a warrant. For example : The defendant, an officer, executes a warrant for the arrest of the plaintiff in a complaint for the non-payment of wages. The court issuing the writ has jurisdiction over such cases, but has no power to issue a warrant ; summons being the only process allowed. The writ is void, and the defendant is liable.³

In such cases, the writ showing its invalidity upon its face, the officer is not bound to serve the process. The effect of the second and third of these rules is to require the officer to know the general extent of the jurisdiction of the court which he is serving. Further than this the law does not go ; and in other cases

<sup>Officers must
know the
general juris-
diction of the
court.</sup>

¹ *Tarlton v. Fisher*, 2 Doug. 671 ; *Deyo v. Van Valkenburgh*, 5 Hill, 242.

² *Stephens v. Wilkins*, 6 Barr, 260.

³ *Shergold v. Holloway*, 2 Strange, 1002.

the officer will be protected, though his writ, being voidable, is liable to be set aside for error, or even though it is actually void.¹ Cases of this kind are always within the limits of the court's general jurisdiction; and the officer is not liable, since, though bound to know the extent of the court's jurisdiction, he is not presumed to know the nature and propriety of all the proceedings in a cause. If the officer does in fact know that the court has no jurisdiction, then, by some authorities, the process is deemed to be void on its face;² but the better rule is, that an officer should not be permitted to refuse to serve process because merely of his own knowledge — or interpretation of facts, for that is what it would come to. Hence he should not be liable for serving the process in such a case.³

If his writ does not indicate its invalidity on its face, the officer is ordinarily safe, though the writ ought not to have issued.

To put the case in the form of a more general proposition, as laid down upon great consideration, a ministerial officer is protected in the execution of process, whether the same issues from a court of limited or of general jurisdiction, though such court have not in fact authority in the particular instance, provided that on the face of the process it appears that the court has jurisdiction of the subject-matter, and nothing appears therein to apprise the officer that the court has not authority to order the arrest of the party named in the process. For example: The defendant, a constable, arrests the plaintiff under a warrant from a justice of the peace issued upon a judgment against the plaintiff in an action within the jurisdiction of the court. The court has authority in such cases to issue a warrant, but in this particular instance the

¹ See *Deyo v. Van Valkenburgh*, 5 Hill, 242.

² *Tellefsen v. Fee*, 168 Mass. 188, Knowlton, J., dissenting.

³ *Wilmarth v. Burt*, 7 Met. 257, 260, 261, Shaw, C. J.; *Tierney v. Frazier*, 57 Texas, 437, 440, 441; also cases cited in *Tellefsen v. Fee*, supra.

suit has not been instituted by the issuance of the necessary process for the appearance of the then defendant, now plaintiff. The defendant has violated no duty to the plaintiff, and is not liable, though the court had no authority to issue the warrant under such circumstances; the process not indicating the fact.¹ Again: The defendant, an officer, arrests the plaintiff, a member of the Legislature, privileged at the time from arrest, the writ not indicating the fact. This is not a false imprisonment.²

The clerk of the court probably will also, like the officer who serves the precept, be liable in case he made out the writ in a defective form. He has done that which he ^{when the} has no right to do, and is therefore forbidden to ^{clerk is liable.} do; and he must accordingly stand upon the same footing with the officer.

The clerk may also be liable when the officer who serves the writ is not liable. And this will be the case whenever the writ, though regular on its face (and hence a justification to the officer), was issued without orders of the court, under circumstances in which such issuance is not by law allowed. For example: The defendant, clerk of an inferior court, issues a writ of capias on which the plaintiff is arrested, without the presence or intervention of the court, upon a default of the plaintiff, as to the granting of which the law requires that the judge should exercise certain judicial functions. The defendant is guilty of a breach of duty, and is liable to the plaintiff; and this too though he only conformed to the usual practice of the court in such cases, since a court cannot delegate its judicial functions.³

The clerk will also probably be liable, like both the officer and the judge, when the writ, issued by order of the court, shows upon its face that the whole cause was without the jurisdiction of the judge. It will be different however if,

¹ *Savacool v. Boughton*, 5 Wend. 170.

² *Tarlton v. Fisher*, 2 Doug. 671.

³ *Andrews v. Marris*, 1 Q. B. 3.

while the proceeding was within the jurisdiction of the court, the particular act merely, commanded by the court, was in excess of its jurisdiction, without the clerk's knowledge. The clerk is merely a ministerial officer, like the sheriff or constable, and is no more bound than such officer to know of the legality of orders of the court within its jurisdiction. For example: The defendant, clerk of a county court, by order of the judge signs and seals a warrant for the arrest and imprisonment of the plaintiff for a period of thirty days, after a certain date, upon failure to conform to an order of court; when the order of commitment should have required an earlier arrest. The defendant is not liable, though the judge (as will be seen) would be.¹

The judge of an inferior court, if he authorizes the arrest, is liable whenever the officer, acting in strict accordance with his When the precept, is liable; provided the precept be not judge is liable. void for defective language. As the judge does not make out the writ, he cannot be liable for such defect; and the clerk is not his agent or servant.² In other cases, that is when the court has not jurisdiction of the cause, the proceeding is *coram non judice*; the court loses its judicial function, and the judge becomes a mere private citizen.³

But more than this, the judge may be liable when the officer is not. This will be true whenever the judge has plainly exceeded his jurisdiction, though in a matter not affecting the officer. For example: The defendant, a justice of the peace, fines the plaintiff under the game laws, as he may do, and then sends him to jail without any attempt to levy the penalty upon his goods, which he has no right to do. He is liable for false imprisonment; though the officer who executes the writ is not.⁴

When the question of the court's jurisdiction turns on

¹ *Dews v. Riley*, 11 C. B. 434.

² *Carratt v. Morley*, 1 Q. B. 18.

³ *The Marshalsea*, 10 Coke, 68 b; s. c. L. C. Torts, 278, note.

⁴ *Hill v. Bateman*, 2 Strange, 710. The arrest was justifiable, so far as the sheriff was concerned, because, though in the particular instance

matter of fact, it is laid down as well settled that a judge of a court of record with limited jurisdiction, or a justice of the peace acting judicially, with special and limited authority, is not liable to an action of trespass (of which the action for false imprisonment is an example) for acting without jurisdiction, unless he had the knowledge, or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction.¹ And it lies upon the plaintiff in every case to prove the fact.² For example: The defendant, a justice of the peace, having jurisdiction to grant a writ of capias in certain classes of civil offences, committed within his district, orders the arrest of the plaintiff, on suit brought against him by a third person, for an offence committed without his district. The defendant however has no knowledge that the act was committed beyond his district, nor is he put upon notice of the fact by anything arising before the arrest. He is not liable for a false imprisonment,³ unless he acted maliciously and without probable cause.⁴

When however the question of jurisdiction does not depend upon the proof of certain facts, but upon a question of plain unauthorized, it was still within the power of the justice to grant such a writ in a proper case; that is, after an ineffectual attempt to levy the penalty upon the party's goods. The officer was not bound to know whether such an attempt had been made. Possibly he might be thought liable had he known that no such attempt had been made; and this knowledge might perhaps have been easily proved. The cases are conflicting. See *ante*, p. 348.

¹ *Calder v. Halket*, 3 Moore, P. C. 28, Parke, B.; *Pease v. Chaytor*, 32 L. J. Mag. Cas. 121, Blackburn, J.

² *Calder v. Halket* and *Pease v. Chaytor*, *supra*, in which *Carratt v. Morley*, 1 Q. B. 18, apparently contra, is doubted.

³ See *Pease v. Chaytor*, *supra*, opinion of Blackburn, J., at pp. 125, 126, from which this example is framed. Another example may be seen in *Lowther v. Radnor*, 8 East, 113, 119. A distinction must however be noticed (which was pointed out in *Pease v. Chaytor*) between a proceeding to prevent the enforcement of a judgment in such a case—that would be proper—and an action against the judge of the court, as in the example.

⁴ *Id.* In such a case, the suit would properly be an action for malicious prosecution.

law, the judge granting the writ¹ acts at his peril; and then if he order the arrest of an individual when he has no jurisdiction, not determinable on facts, he will be liable for false imprisonment. For example: The defendant, judge of a court of record of limited jurisdiction, directs the arrest of the plaintiff for contempt of the process of the court, and commits him to jail. The commitment is unauthorized, and is made under a mistake of plain law about the powers of the defendant, and not under mistake as to the facts; the statute requiring that the process (under the circumstances) should have been issued by the court of another county. The defendant is liable.²

From the statement of the foregoing principles and examples, it will be seen (1) that the officer alone may be liable for false imprisonment; as where he executes his writ upon **Summary.** the wrong person, without the latter's fault: (2) that the clerk alone may be liable; as where, without direction from the judge, he issues a precept regular in form, and within the jurisdiction of the court, but which he had no right at all to issue: (3) that the judge alone may be liable; as where, having jurisdiction over the cause, he orders the issuance of the warrant under circumstances in which the act was improper: (4) that the officer and the clerk may be liable; as where the writ contains substantially defective language: (5) that all three may be liable; as where the whole cause, in the course of which the writ is issued (at the command of the judge), is without the jurisdiction of the court.

This is not all. The liability for a false imprisonment may extend to the attorney at whose instance the proceeding was begun, and, further still, to his client who authorized him to begin it. Indeed, this will always be the case wherever it can be properly said that the wrongful imprisonment was ordered or participated in by the client. But of this further below.

¹ That is, the magistrate originally acting; not, it seems, a superior judge to whom the case may have been taken.

² *Houlden v. Smith*, 14 Q. B. 841.

When the judge assumes the power of ordering the warrant, upon a statement of the grounds, the act (with an exception to be stated presently) is his own, and not the attorney's or his client's;¹ and this too in America, though the writ were asked for on false representations;² the attorney or client has not set a ministerial but a judicial officer in motion.³ If this be the extent of the connection of the attorney and client with the arrest, neither can be liable, whether the writ was granted upon a mistaken view of the case by the judge in regard to his jurisdiction (in which case *he* might be liable), or was issued in a materially defective form (in which case the clerk and the officer would be liable); the act is that of another. Illustrations may be seen in the examples above given. Hence the attorney and client may not be liable, though the process was void on its face.⁴

It is laid down in England, contrary to recent American authority, that when the warrant was issued under false representations, or even through mistake of counsel or client, the act is not the act of the judge, unless he had no jurisdiction to grant the process, but of the attorney, and of his client whom he represents.⁵ The consequence is, that both

¹ *Cooper v. Harding*, 7 Q. B. 928; *Williams v. Smith*, 14 C. B. n. s. 596; *Smith v. Sydney*, L. R. 5 Q. B. 203.

² *Everett v. Henderson*, 146 Mass. 89.

³ In this appears a clear distinction between an action for false imprisonment and one for malicious prosecution. 'The party making the charge [before a magistrate] is not liable in an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and the judgment of a judicial officer are interposed between the charge and the imprisonment.' *Austin v. Dowling*, L. R. 5 C. P. 534, 540, Willes, J.

⁴ *Carratt v. Morley*, 1 Q. B. 18. The client had done nothing but to ask for a writ; and the court, acting judicially, granted it. The act was therefore the act of the judge, and not of the party. The latter, to be liable, must either have directed the execution of the writ after its issuance, or have obtained it from the court in an irregular manner, or have participated in the execution of it.

⁵ *Williams v. Smith*, 14 C. B. n. s. 596; *Codrington v. Lloyd*, 8 Ad. & E. 449; *Collett v. Foster*, 2 Hurl. & N. 356. See *Davies v. Jenkins*, 11 M. & W. 745.

are there liable for false imprisonment upon the execution of the warrant, even though they take no further steps in the matter than those involved in obtaining the same.¹ For example: The defendants, attorney and client in a former suit against the present plaintiff, obtain a warrant therein for the latter's arrest upon material misrepresentations made in an affidavit upon which the warrant is awarded, on account of which misrepresentations the warrant is, after the plaintiff's arrest, set aside. They are both liable.² Again: The defendant, by his attorney, in a former suit against the now plaintiff, procures the arrest therein of the last named under a writ issued by mistake against a person not bearing the name of the present plaintiff. This is a false imprisonment, and the defendant is liable, although the person intended was arrested.³ Again: The defendants, attorney and client in a former civil action against the now plaintiff, in which they obtained judgment against him, obtain a warrant for the arrest of the plaintiff by virtue of the judgment, after a discharge therefrom of the plaintiff by proceedings in insolvency, of which the defendants had notice. They are liable for false imprisonment; unless it can be shown that the discharge was obtained by fraud.⁴

¹ This, in England, appears to be considered as irregularity, which is the act of the party and not of the court. In Massachusetts, issuing the writ on false representations as the basis of it and not merely as collateral to it would be *error*, which is the act of the court; and that too whether the false representations were made in mistake or by design. *Everett v. Henderson*, 146 Mass. 89.

² *Williams v. Smith*, 14 C. B. N. S. 596. The action was not sustained in this second suit, because the misrepresentations were not material.

³ See *Jarmain v. Hooper*, 6 Man. & G. 827.

⁴ *Deyo v. Van Valkenburgh*, 5 Hill, 242. This is the exception alluded to above, by which the attorney and client are liable, though the judge has been merely asked to grant the warrant. But it was misconduct to ask for the warrant when it was known that the judgment had been discharged, unless proof could be brought that the discharge was fraudulent. The judge, having no jurisdiction to grant the warrant in such a case, would also be liable, it seems.

The attorney, and his client with him, may, in other cases also, become liable where the arrest has been ordered by the judge. Such a result will come about whenever the attorney participates in any manner in effecting the arrest after the issuance of the improper warrant. For example: The defendants, attorney and client in a former litigation against the present plaintiff, having obtained an erroneous warrant against the latter from the judge, the attorney personally puts the precept into the officer's hands, and directs him to serve it. The defendants are both liable; the attorney because of his personal interference, the client because bound by the act of his attorney in the ordinary course of the litigation.¹ Again: The defendant, an attorney, indorses with his name and residence an invalid warrant, issued against the plaintiff. This makes him a participant in the false imprisonment which follows;² and his client also.

Liability of attorney and client.

It will thus be seen that there may be cases in which all the parties named will be jointly liable, client, attorney, officer, clerk, and judge. Such will be the result where the attorney personally directs the officer to serve a writ upon the plaintiff, issued by the judge's order, in a civil cause, wholly beyond the jurisdiction of his court.

Summary.

A certain fundamental difference between civil and criminal cases should be noticed; the parties are different. A civil suit is a litigation between individuals; a criminal suit is a litigation between the public and an individual. The prosecutor in a criminal action does not represent the plaintiff in a civil suit. A civil proceeding is instituted in the interest and for the benefit of the plaintiff, and is under his control throughout; the plaintiff is 'dominus litis.' False steps and misconduct on his be-

Difference between civil and criminal actions.

¹ Barker *v.* Braham, 2 W. Black. 866; s. c. L. C. Torts, 235.

² Green *v.* Elgie, 5 Q. B. 99.

half in the course of the litigation will therefore bind him, as has already been seen. The prosecutor of crime however is not a party to the litigation instituted by him. The proceeding is not carried on primarily in his interest; and he has no control over its course. The consequence is, he cannot be bound by the action of the attorney-general or other prosecuting officer. He may however bind himself, and become liable for a false imprisonment by acts of his own, or of counsel whom he may employ to assist the attorney-general. If the prosecutor or his attorney should personally direct the service of invalid process, whether void or only voidable, he would be liable to the party arrested.¹

Before an action for false imprisonment under process of court can be maintained, it is necessary that the process should be set aside, unless it appear to be absolutely void. For if the process be merely voidable, it is valid until quashed; and hence the arrest must, till then, be legal. If however the process be absolutely void, and the action be brought against the proper party or parties, it is not necessary probably, either in cases of civil or of criminal arrest, to have it set aside before suing for false imprisonment. For example: The defendant procures the arrest of the plaintiff on a warrant issued upon a judgment which the former knows to have been discharged; and the plaintiff sues for false imprisonment without first having the process set aside. The action is maintainable; the process being absolutely void.² Again: The defendant, a justice of the peace, procures the arrest of the plaintiff upon four convictions before him of baking bread on one and the same Sunday; the law permitting but one conviction in such a case. The defendant is liable for false imprisonment, though the wrongful convictions be not first quashed.³

¹ *Hopkins v. Crowe*, 4 Ad. & E. 774.

² *Deyo v. Van Valkenburgh*, 5 Hill, 242.

³ *Crepps v. Durden*, 2 Cowp. 640. In this case there was no arrest, but

In both civil and criminal cases however the action for false imprisonment is to be distinguished from a suit for malicious prosecution. The process under which an imprisonment was made may have been, as regards the party or parties sued for the tort, either void or voidable;¹ and, in such a case, the action is maintainable without proof of malice, or of want of probable cause, or of the termination of the prosecution. In an action for malicious prosecution however it matters not whether the writ was void, voidable, or valid; the suit is for an unlawful prosecution, and to make such a case the plaintiff must prove the set of facts just stated.

Malicious
prosecution
distinguished.

§ 3. ARRESTS WITHOUT WARRANT.

It is not necessary however, in all cases, that an arrest for an infraction of the law should be made under authority and by command of a warrant. There are occasions on which the utmost promptness of action is required for the attainment of the ends of justice in the apprehension of law-breakers; and the necessities of society have in such cases furnished a justification for the arrest of offenders without a formal warrant of a court of justice. But the law does not encourage the making of arrests in this manner; on the contrary, in the interest of liberty, it prefers a slower and more deliberate proceeding by warrant, issued upon solemn oath concerning the facts, in all cases in which the administration of justice can thus be efficiently carried out.

Occasions for
acting with-
out process.

The occasions on which arrests without a warrant are con-

merely a levy on the plaintiff's goods for the amount of the penalty; but the principle would be the same.

¹ It will be noticed that to sustain an action against the officer who served the writ, or against the clerk, the writ must have been void on its face; while it is enough in *this* respect to sustain an action against the judge or attorney and client, that the writ was only voidable.

sidered justifiable upon the above-stated ground are well defined. In the first place, it must be well understood that the right to make such arrests is confined altogether to infractions of the criminal law. In no case can an officer make an arrest in a civil cause without the protection of a warrant. It may be true, as has already been stated, that, in cases of the release of a prisoner arrested on process in a civil action, the officer may retake the party without obtaining a special warrant for this particular purpose; but that is because he has already a warrant, which is still in force. Hence, the officer does make the arrest under a writ; and he must justify his act under that writ.

The first case to be mentioned in which an arrest can be made without a warrant, is when the arrest is made upon the Arrest on the spot, at the time of the breach of the peace. Such a case comes directly within the reason above mentioned, namely, the necessities of society; nor could there be any use of requiring an affidavit and warrant in such a case, even if the delay might not be fatal. The right thus to arrest on the spot applies equally to all breaches of the peace, whether the act be a crime or a misdemeanor.

An arrest without warrant may also be made by an officer of the law, qualified for the making of arrests, upon ‘suspicion On suspicion : probable cause. of felony,’ to use a common expression of the books. The meaning of this is, that if in an action for false imprisonment, without warrant (that is, *because* without warrant), the officer can show that, though no felony was in fact committed, he had *probable cause* to suppose that the prisoner had committed such a crime, he has violated no duty to the plaintiff in thus making the arrest.¹ For example: The defendant, a constable, having probable cause to believe that the plaintiff is guilty of the felony of receiving or aiding in the concealment of stolen goods, arrests him without a warrant, and conveys him to jail, where he de-

¹ *Robinson v. Van Auken*, 190 Mass. 161.

tains the prisoner until he can make application to a magistrate for a warrant against him as a receiver of stolen goods. The warrant is refused, and the prisoner at once discharged. The defendant is not liable.¹

In these cases, since the officer has no warrant to justify him, he has to show probable cause for the arrest. The officer's action is not a setting in motion of the courts, as it is in a prosecution by a prosecutor or plaintiff; hence the difference, in regard to proving probable cause, between a suit for false imprisonment and one for malicious prosecution.

The officer's 'suspicion' must of course, as above intimated, be a reasonable ground to suppose the prisoner guilty of a felony;² that is, it must be such a strong suspicion as would justify a man of caution in entertaining a belief of the party's guilt. If the circumstances do not warrant such a belief, even though in fact a felony has been committed, the officer violates his duty to the plaintiff by arresting him without process of court.³ For example: The defendant, a constable, arrests and imprisons the plaintiff, without process, under the following circumstances: The cart of the plaintiff, a butcher, is passing along the highway, when a person, in the habit of attending fairs, stops the cart and says to the officer (defendant), 'These are my traces, which were stolen at the peace-rejoicing last year.' The defendant asks the plaintiff how he came by the traces. The plaintiff replies that he saw a stranger pick them up in the road, and bought them of him for a shilling; whereupon he is taken into custody, and, on

¹ Rohan *v.* Sawin, 5 CUSH. 281. Note that the magistrate's *subsequent* action has no bearing on the officer's justification of probable cause. Compare *ante*, pp. 214, 217, note 2.

² Robinson *v.* Van Auken, 190 Mass. 161.

³ Process would justify the officer in such a case; although the granting of it falls short of a judicial finding that there exists probable cause to believe the party guilty,—upon which, if there were such a finding, the officer might in principle be justified in acting even if he were not bound to act. But acting without process, the officer has to prove probable cause. The term 'probable cause' here, as in the chapter on Malicious Prosecution, is used for 'reasonable and probable cause.'

examination before a magistrate, discharged. This does not show probable cause for the arrest, and the defendant is liable.¹

In the authority from which this example is taken, the whole case was given to the judges, with power to act as a jury so far as might be necessary for the decision of the question before them. It therefore does not appear from the decision, whether the question of probable cause is to be considered as a question for the judge or for the jury; and the point was expressly left undecided by the judges.

Who decides probable cause. The question has indeed been one of some difficulty. In some of the cases it has been tacitly assumed that the jury must determine whether the officer had probable cause for taking the plaintiff into custody;² in others, that it is for the court to say whether the facts proved show proper cause.³ The point has however been decided in England in accordance with this latter view, though not without expressions of regret;⁴ making the rule to conform to that of actions for malicious prosecution.

If the analogy furnished by the law of actions for malicious prosecution is to be fully carried out, and it appears reasonable that it should be, it will also be necessary for the officer to show that this reasonable ground for making the arrest consisted of facts within his own possession at the time of the arrest, and that he cannot justify on facts which afterwards came to his notice. Nor, on the other hand, if his justification lie in the facts before him at the time of taking the party into custody, will his defence be overturned by evidence of facts indicating innocence, that came to his notice after the imprisonment.⁵

At common law no valid arrest without a warrant can be

¹ *Hogg v. Ward*, 3 H. & N. 417.

² *Beckwith v. Philby*, 6 B. & C. 635; *Rohan v. Sawin*, 5 Cush. 281; *Brockway v. Crawford*, 3 Jones, 433.

³ *Hill v. Yates*, 8 Taunt. 182; *Davis v. Russell*, 5 Bing. 354.

⁴ *Lister v. Perryman*, L. R. 4 H. L. 521, 531, 538, 539.

⁵ See ante, pp. 213, 214.

made for a misdemeanor, except on the spot.¹ To arrest a man, without process, on suspicion that he has committed a misdemeanor, although upon probable cause for ^{Arrest for} ~~misdemeanor~~, his arrest, is a breach of duty.² For example: The defendant, a constable, arrests the plaintiff without a writ on the statement of J. M., that the plaintiff has committed the offence of perjury, by wilfully and corruptly making a false affidavit in a judicial proceeding before the Honorable W. W., judge of a court, and he takes the plaintiff into custody upon this charge, at the direction of J. M. He is liable to the plaintiff for a false imprisonment;³ though he would not have been had the offence charged been a felony.

And the arrest must not only have been made upon the spot; it must also have been made, in the case of an actual breach of the peace, before the breach has entirely ceased. For example: The defendant, a constable, takes the plaintiff into custody without a warrant under the following circumstances: The plaintiff had been making a disturbance about certain premises in the night-time, and had refused, on request of the defendant, to desist. Perceiving that the defendant intends to arrest him, the plaintiff flees and is pursued, overtaken, and arrested; the disturbance having previously ceased. The defendant is liable.⁴

In the case of affrays however an arrest may be made without a warrant not only during the actual breach of the peace, but so long as the offender's conduct shows that ^{Affrays.} the public peace is likely to be endangered by his acts. Indeed, while those are assembled together who have

¹ Whether and how far this may have been changed in regard to the duties of policemen in large cities cannot here be considered.

² So of larceny below the grade of felony. *Robinson v. Van Auken*, 190 Mass. 161.

³ *Bowditch v. Balchin*, 5 Ex. 378. See *Commonwealth v. Carey*, 12 Cush. 246, 252; *Commonwealth v. McLaughlin*, id. 615, 618.

⁴ Compare *Baynes v. Brewster*, 2 Q. B. 375, where the defendant, on such facts, was a private citizen; but the rule would have been the same had he been an officer, as the language of Mr. Justice Williams in that case shows.

been committing acts of violence, and the danger of renewal continues, the affray may be said to continue; and during the affray, thus understood, the officer may arrest the offender not only on his own view, but even on the information or complaint of another. This is true even of an arrest by a private citizen.¹ For example: The defendant arrests the plaintiff without process under the following circumstances: The plaintiff had entered the defendant's shop to make a purchase, when a dispute arose between the plaintiff and a servant of the defendant resulting in an affray between them. The defendant, coming into the shop during the affray, orders the plaintiff to leave, which he refuses to do; the violence having then ceased, though there is still danger of a renewal of the affray. The defendant now gives the plaintiff into the custody of an officer. This is no breach of duty to the plaintiff.²

The example given leads to the consideration of the nature of the right of a private citizen to arrest offenders without process of court; for it is probably lawful for such a person to make an arrest upon a warrant under the same circumstances in which an officer could do so.

Right of private citizen to make arrest. The rule of law in regard to arrests for misdemeanors by private citizens is the same as prevails concerning officers; they are entitled to make the arrest without process while the breach of the peace is going on, or (in accordance with the explanation given) still continues. And a private citizen has no right to make an arrest, without process, for a misdemeanor after its termination, though the breach of peace was committed about his own premises.³

In regard to felonies, the rights of officers and private citizens are different. While an officer can arrest without a warrant upon probable cause, though no felony has been com-

¹ *Timothy v. Simpson*, 1 Crompt. M. & R. 757; s. c. L. C. Torts, 257; *Baynes v. Brewster*, 2 Q. B. 375, 386.

² *Timothy v. Simpson*, supra.

³ *Baynes v. Brewster*, 2 Q. B. 375, 386.

mitted, a private citizen can safely make an arrest without a warrant only when (1) the felony charged has actually been committed, and (2) there was probable cause for supposing the party arrested to be guilty.¹

¹ *Allen v. Wright*, 8 Car. & P. 522; s. c. L. C. Torts, 265. In *Commonwealth v. Carey*, 12 Cush. 246, 251, Chief Justice Shaw, in a dictum, states the rule thus: 'A private citizen, who arrests another on a charge of felony, does it at the peril of being able to prove a felony actually committed by the person arrested.' But that statement, which was only a dictum, appears to be a mere slip. See *McCloughan v. Clayton*, 17 Rev. Rep. 669, and note by original reporter Lord Holt.

CHAPTER XII.

TRESPASSES UPON PROPERTY.

Statement of the duty. A owes to B the duty (1) not to enter B's close, without permission ; (2) not to take or interfere with possession of B's chattels, without permission ; unless, in either case, A has a better right than B to the possession of the property.

The term 'close' signifies a tract of land, whether physically enclosed or not.

'Breaking and entering the close' is an ancient term of the law, now nearly gone out of use, indicating an unlawful entry upon land. The term 'entry' or 'unlawful entry' will be used in the present chapter as synonymous with 'breaking and entering.'

In early times possession was looked upon as like ownership at the present day — we still speak of a man's 'possessions' as of his ownership. The remedy of trespass (to property) was accordingly conceived of as a remedy for interference with *actual* possession, as being an open and tempting subject of attack. In modern times it has been found necessary, as will be seen later, to extend the conception of trespass (for no new remedy has taken its place) to certain cases in which the possession is fictitious, — where there is or was only a right of possession, as in the case of the fiction of relation in regard to land and the right to take possession of goods. Trespass between cotenants is an extension of trespass in another way. Of these cases in their place. The action of trespass accordingly has always been called a 'possessory' action.

§ 1. WHAT MUST BE PROVED.

A trespass to land is an unlawful entry upon land; a trespass to goods is an unlawful taking or interfering with the possession of goods. All other wrongful acts connected with the trespass are aggravation of the wrong. Accordingly, to prove an unpermitted entry upon land in the plaintiff's possession, or the interrupting of the plaintiff's possession or right to take possession, of goods, is necessary to make, and will make, a *prima facie* case.

§ 2. POSSESSION.

In order to maintain an action solely for damages for a trespass to land, and not merely for the recovery of the land, it is necessary, apart from statute, for the plaintiff to have had possession of the premises entered at the time of the entry. A person who enters the land of another without the latter's permission, the latter having before been unlawfully deprived of possession or the land having never been in his possession, *may* indeed violate a duty to the person entitled to the possession; but the common law requires the latter to get possession of the land before giving him damages for the wrong committed. By statute the owner may sue for possession and damages in one action.¹

Possession in actions for trespass.

If however the party had possession at the time of the entry, and the trespasser ejected him, it would not be necessary for him to recover possession before he could sue for damages for the wrongful entry and expulsion; he had possession at the time of the trespass and disseisin, and that is sufficient for the purposes of such an action.² He could not however recover

¹ In some States, if the owner sue for possession, he *must* claim his damages in the same action, or he will be barred of the right to recover them. *Raymond v. Andrews*, 6 *Cush.* 265. See *Leland v. Tousey*, 6 *Hill*, 328. If possession however is obtained without suit, an action for damages is maintainable. *Leland v. Tousey*, *supra*.

² *Case v. Shepherd*, 2 *Johns. Cas.* 27.

damages for the loss sustained by reason of the disseisor's *occupancy*, until after a re-entry,¹ or suit for recovery of possession,—a point to be further considered hereafter.

On the other hand, possession at the time of the entry, if held under a claim of right, is *prima facie* sufficient in all cases to enable a person to maintain an action for ~~Possession without right.~~ an entry upon the land without his permission ; and possession alone is not only *prima facie* but absolutely sufficient against all persons who have not a better claim than the possessor.² It follows that one who is in possession of land under a claim of title, though without right, may recover for an entry by a wrongdoer ; that is, by one who enters without a right, or under one not having a right. For example : The defendant enters without permission upon land in the possession of the plaintiff, whose possession is under a void lease. The defendant is liable.³

But the defendant is not necessarily guilty of breach of duty to such a possessor by reason of the fact that he (defendant) does not own the land. He may still have a legal or an equitable interest in the premises ; he may be a lessee of the land ; he may be a trustee of the estate or the cestui que trust ; or he may be a licensee of one having a right of entry. In any of these cases he would be entitled to enter upon the premises, if he could do so without breaking the peace. A licensee of one having possession may make a peaceable entry against a wrongdoer, though a licensee has no interest whatever in the soil, and could have no entry against the will of a person *entitled* to the possession. For example : The defendant enters, without permission of the plaintiff, premises of which the plaintiff is wrongfully in possession ; the act being done by direction of the owner of the land, who is entitled to possession. The defendant

¹ *Case v. Shepherd*, 2 Johns. Cas. 27.

² Cotenancy makes an exception. See post, p. 373.

³ *Graham v. Peat*, 1 East, 244. 'Any possession is a legal possession against a wrongdoer.' Lord Kenyon. See *Cutts v. Spring*, 15 Mass. 135; *s. c. L. C. Torts*, 341.

violates no duty to the plaintiff;¹ though the case would have been different had he entered without authority of the owner.²

If there be two persons in a close, each asserting that the premises are his, and each doing some act in the assertion of the right of possession, he who has the real title ^{Contested possession.} or right is considered as being in possession; and the other is a trespasser.³ The former is therefore in a position to demand damages of the latter for his wrongful entry. For example: The defendant is in possession of land without right, and so continues after the plaintiff, who is the owner, enters to take possession, ploughing the land. The defendant is guilty of trespass to the plaintiff.⁴ Again: The defendant is in occupancy of land jointly with the plaintiff, claiming to be a tenant in common of the premises with the plaintiff. His claim however is unfounded, and the plaintiff is owner of the close. The defendant may be treated by the plaintiff as a trespasser.⁵

If neither of the parties in occupancy has a right to the close, the question whether either of them has violated a duty to the other, supposing each to claim possession, will turn upon the 'exclusive priority of possession.' The one who first entered, if he took exclusive possession, will be entitled to damages against the other; if he did not so take, neither can recover against the other. For example: The defendants claim a right to take cranberries in an unoccupied field under a license from one H. The plaintiffs have previously entered into possession of the land, and forbidden all persons by public notice to take cranberries therefrom, except on certain conditions, with which the defendants do not

¹ *Chambers v. Donaldson*, 11 East, 65.

² The subject of rights of entry in general will be considered hereafter,
§ 3. It is introduced here merely to show the consequences of possession.

³ See *Reading v. Royston*, 2 Salk. 423.

⁴ *Butcher v. Butcher*, 7 B. & C. 399.

⁵ *Hunting v. Russell*, 2 Cush. 145.

comply. H, under whom the defendants claim, had entered before the entry of the plaintiffs; but neither H, nor the defendants, nor the plaintiffs have any right to the soil or the berries; and neither ever had exclusive possession. The defendants have violated no duty to the plaintiffs;¹ and so in the converse case.²

There is this important distinction between the law relating to possession of real property and that relating to possession of personality: to enable a plaintiff to recover for trespass to realty, he must have had a real possession;³ while a plaintiff may recover for trespass to personality if he had a *right* to take possession,—in which case he is said to have constructive possession. To assimilate the two cases, it is often said that the right to take possession of personality draws possession in law. Whoever then has a right to the possession of a chattel, whether it be towards all the world or only towards the defendant, is in a position to sue for an interruption of his enjoyment thereof. For example: The defendant, without permission, takes goods out of the possession of A, after A has sold them to the plaintiff, but before they have been delivered to him. This is a breach of duty to the plaintiff.⁴

¹ Barnstable *v.* Thacher, 3 Met. 239.

² Id.

³ There is one exception, the case of possession of land by what is called ‘relation;’ of that, further on. See p. 376. That is the one true case of constructive possession of realty, in regard to trespass.

⁴ Bacon’s Abr. Trespass, C. 2; L. C. Torts, 270. Quære, whether possession of personality in itself will support an action, as e. g. the possession of a thief who is dispossessed by another thief? It is urged that mere possession is enough. Pollock & Wright, Possession, 91, 93, 147, 148. It may on the other hand be urged that only that sort of possession which is capable of ripening into a title should be protected, as e. g. the possession of a finder. In the Roman law a thief could not have the ‘actio furti.’ Dig. 47, 2, 11; id. 47, 2, 12, 1; Inst. 4, 1, 13. See also Buckley *v.* Gross, 3 Best & S. 566, 573, Crompton, J. As to the criminal law of such cases see Commonwealth *v.* Rourke, 10 Cush. 397, 399; Pollock & Wright, Possession, 118 et seq.

What constitutes real possession however, as distinguished from a right to take possession, is one of the difficult questions of the law, especially when it comes to the application of definition to particular cases. Contact Meaning of possession. certainly is not necessary; it is enough for a man, so far as that is concerned, that no one else has possession, and that he has in consequence power to take the property in hand at will. Indeed, a man who is holding property of right has possession, against one who may be struggling or striving against him or others, on the spot or in court, to gain possession; this follows from what has already been stated.

That conception of the term 'possession' which on the whole most nearly harmonizes with the authorities on specific situations where there is no strife for the right, appears to be this: there must be (1) a power of control over property, and (2) a purpose to exercise the same for the benefit, at the time, of the holder, or facts from which such a purpose could be assumed if the mind were directed to the object of possession.¹ It is clear that without these two facts there is no true possession in the eye of the law; but to say that there *is* possession in all cases with them would be to say that the authorities are in harmony. A mere servant may have 'detention' or custody, but, as servant, can have no possession, according to current views, because a servant does not hold in his own right;² but what of an agent,³ or a bailee for hire, or a tenant at will?

¹ Compare *London Banking Co. v. London Bank*, 21 Q. B. D. 535, 542; and see *Regina v. Ashwell*, 16 Q. B. D. 190.

² *Year Book*, 13 Edw. 4, 9, 10, pl. 5; 21 Hen. 7, 14, pl. 21; *Harris v. Smith*, 3 Serg. & R. 20; *Hampton v. Brown*, 13 Ired. 18. These are all common-law authorities; but the point is not free from doubt. See *Holmes, Common Law*, 226-228; *Moore v. Robinson*, 2 B. & Ad. 817; *Matthews v. Hursell*, 1 E. D. Smith, 393; *Regina v. Ashwell*, 16 Q. B. D. 190.

Perhaps a reason in regard to the case of the servant is that his interest is too slight; *de minimis non curat lex*. Then the criminal side of the case may be noticed; if the servant has possession, the possession has been given to him by his master, and he cannot be guilty of larceny.

³ See *Knight v. Legh*, 4 Bing. 589, Best, C. J., holding that an agent might bring trover, as having possession.

The authorities are not agreed. It is said that none of them has possession. Thus, some say of tenants at will, that both tenant and landlord cannot be in possession at the same time, and the landlord certainly is possessed in contemplation of law. Others treat both as having the *rights* of possessors; and this in effect is the legal view.¹ Agents and bailees for reward have possession, by the better view.² Indeed any bailee liable over to his bailor may, it seems, maintain trover.³

Knowledge of the right appears to be unnecessary to possession; if a thing of value is delivered for me, I am presumed to accept it until I refuse. The delivery, whether I know it or not, is significant of my possession; enough that no one else has possession.⁴

A reversioner or remainder-man after an estate for years can indeed maintain an action for injuries done to his interest,

Reversioner and remainder-man. notwithstanding the fact that the land is in the possession of the termer. Injuries done to such interests are not however, in strictness of common-law ideas, trespasses. The trespass consists in the wrongful entry upon the land, and this is a tort to the tenant, and not to the landlord or remainder-man; since it is an interference with the possession, which belongs to the tenant. For example: The defendant enters upon the plaintiff's land, let for years, in the assertion of a right of way, driving thereon his horses and cart, and continuing so to do after notice from the plaintiff to quit. The defendant has violated no duty to the plaintiff.⁵

¹ See *Starr v. Jackson*, 11 Mass. 519, where the cases are reviewed; and see *Markby*, Elements of Law, § 388, 3d ed. Tenant at *will* clearly holds for himself while he *wills* and is permitted to hold.

² As to bailees see *Claridge v. Tramways Co.*, 1892, 1 Q. B. 422.

³ *Id.*

⁴ It seems then that if an article is delivered to my servant, to be taken to me, and he makes off with it, with felonious intent, he is guilty of larceny from me. It was his felonious act, not the delivery of the article to him, that gave him possession.

⁵ *Baxter v. Taylor*, 4 B. & Ad. 72. The action was 'case.'

Damage done to the inheritance in the case of leasehold or mortgaged land is waste if committed by the tenant or mortgagor, and a tort which may be deemed to be ^{waste.} in the nature of (but not strictly as) a trespass, if committed by a stranger. But whatever term may be applied to the act, it is a breach of duty to the landlord or mortgagee, for which he is entitled to recover damages. For example: The defendant, a tenant, or a mortgagor, or a licensee, or a stranger, cuts down trees on land owned by the plaintiff, or of which he is mortgagee or remainder-man, without the plaintiff's consent. This is a breach of duty to the plaintiff, and the defendant is liable to him in damages; though the plaintiff is not in possession.¹

A similar rule of law prevails in regard to injuries done to personal property held on lease or on pledge, or by a mortgagor in possession. For an injury done to the possessor's interest merely, that is, for a simple unlawful taking of the goods, the remedy belongs to the possessor alone; but for an injury done to the reversion, or to the mortgagee if the goods be mortgaged, the landlord or the mortgagee is entitled to treat the act as a breach of duty to him and call for redress.² For example: The defendant levies on and sells goods in the possession of S, whose right to the possession rests upon an agreement by the plaintiff to convey the same to him upon the payment of notes given therefor. The defendant has not been led by the plaintiff to suppose that the goods belong to S; on the contrary, the defendant has notice, at the time of the levy, of the plaintiff's title. The defendant's act in disposing of the goods is a breach of duty to the plaintiff, and he is liable in damages; though the right of possession is in S.³

Personal
property held
on lease or
pledge.

¹ See *Young v. Spencer*, 10 B. & C. 145; *Page v. Robinson*, 10 Cush. 99; *Cole v. Stewart*, id. 181. None of these are cases of actions by remainder-men, but they cover such cases in principle. The form of action at common law is 'case' and not trespass.

² In 'case,' or trover, at common law. See *Farrant v. Thompson*, 5 B. & Ald. 826, where trover was brought.

³ *Ayer v. Bartlett*, 9 Pick. 156.

A man's close includes not only his actually enclosed land, but also all adjoining unenclosed lands held by him ; and, if he is in possession of any part of his premises, he is in possession of the whole, unless other parts Extent of control : unenclosed land. are occupied by tenants for term of years or by persons who claim adversely to him. The owner has the 'power of control' and the 'purpose to exercise the same' for himself ; he is therefore in a proper position to recover damages for trespasses committed in any part of his premises, the unenclosed as well as the enclosed.¹ For example : The defendant, without permission, enters and cuts timber in an open woodland of the plaintiff, adjoining a farm upon which the plaintiff resides. The plaintiff is in possession of the woodland, and is entitled to recover.²

The foregoing proposition in regard to possession of adjoining unenclosed land supposes that the party injured has a right to the possession of the enclosed premises actually occupied by him. One however who is in possession of land without title or right can have no such extended possession ; the rights of a bare possessor are limited by the bounds of his immediate occupation and control. For example : The defendant, having wrongful possession of the south end of a lot, cuts timber upon the north end thereof, lying without the limits of his actual occupation ; which timber has been purchased and duly marked by the plaintiff. The land on which the timber stood is not in the possession of the defendant,

¹ Such possession is often called 'constructive,' but that term, like the term 'symbolical' possession, is apt to darken counsel. Possession is surely real when one's control can be extended over the property at any time. See *Markby, Elements of Law*, §§ 353, 359, 360, 3d ed.

² *Machin v. Geortner*, 14 Wend. 239 ; *Penn v. Preston*, 2 Rawle, 14 ; *Jones v. Williams*, 2 M. & W. 326, 331 ; *Lord Advocate v. Blantyre*, 4 App. Cas. 770, 791 ; *Coverdale v. Charlton*, 4 Q. B. D. 104, 118. 'I hold that there is no usage of the country, nor rule of the common law, nor any reason requiring a man to enclose his timber land, and that for any possible purpose that can be named the woods belonging to a farm are as well protected by the law without a fence as with one.' *Tod, J.*, in *Penn v. Preston*, *supra*.

and the plaintiff is entitled to damages for the violation of his right of property ; though he has no right to the land.¹ Again : The defendant, without right or authority, enters upon an open woodland adjoining enclosed land in the wrongful possession of the plaintiff. The act is no breach of duty to the plaintiff.²

One of several cotenants, whether of real or of personal property, cannot maintain an action against his fellow tenant for acts relating to the common property, not amounting to an ouster ; because all the cotenants have equal rights of possession and property. For example : The defendant, cotenant of land with the plaintiff, cuts and carries away therefrom timber, at the same time denying to the plaintiff any right in the premises, but not withholding possession from him. The defendant has violated no duty to the plaintiff.³

If, in the case of real estate, the act of the defendant however amount to an ouster of the plaintiff from the possession of the common property, the act is a trespass, and the defendant is liable ; provided, at least, an action of ejectment would at common law be maintainable. For example : The defendant, being cotenant with the plaintiff of a certain room in a coffee-house, expels therefrom the plaintiff's servant, in derogation of the plaintiff's right of occupation. The defendant is liable to the plaintiff in damages ; since an action of ejectment for restoration to possession would lie.⁴

Whatever amounts, or if persisted in might amount, to an effectual privation of the associate tenant of participation in the possession of the common property

Ouster and
ejectment.

¹ *Buck v. Aiken*, 1 Wend. 460. The plaintiff became possessed of the trees as soon as they were cut down by the defendant.

² It is difficult to find judicial authority for this example, because perhaps of its simplicity. Its correctness is clear.

³ *Filbert v. Hoff*, 42 Penn. St. 97; *Reading's Case*, 1 Salk. 392.

⁴ *Murray v. Hall*, 7 C. B. 441. Ejectment, it was said, was originally an action of trespass, and was always deemed to include trespass. Hence, if that form of remedy may be used, trespass lies.

amounts to an ouster, even though there be no actual expulsion or withholding of possession from him. For example: The defendant, cotenant with the plaintiff of a certain close, digs up the turf and carries it away, without the plaintiff's consent. This is an ouster, for which the defendant is liable to the plaintiff in damages; since, if the cotenant were permitted to take the turf, he would be entitled to dig away the soil below the turf, and might thus effectually deprive his fellow of his right to the possession.¹

If the criterion of this remedy between cotenants for an ouster be the question whether an ejectment would be maintainable, it follows that an action for trespass in respect of *goods* held in common cannot be maintained by one cotenant against another; for an action of ejectment lies for the recovery of land only. Nor indeed is there any authority in opposition to this suggestion; the question of the right of action having, so far as the reported authorities go, always arisen in regard to common rights in realty.² Some decisions in this country have denied the remedy even when resorted to in cases of real property.³ But it is apprehended that

¹ Wilkinson *v.* Haygarth, 12 Q. B. 837. The defendant would not have been liable to an action for *trespass* for taking and carrying away the growing grass or crops. *Id.* Accounting between cotenants was provided for by 4 Anne, c. 16, § 27, where one cotenant has taken more than his share of the profits. That statute has been re-enacted in effect in this country.

² See the cases cited in L. C. Torts, pp. 358-360.

³ Wait *v.* Richardson, 33 Vt. 190. See also Bennet *v.* Bullock, 35 Penn. St. 364, 367.

The subject has passed through four distinct stages. The following appears to be the history of it:—

1. When Littleton wrote (1475), and later, an ousted cotenant of land for years could have ejectment ('*ejectio firmæ*'), but not, it was said, trespass. *Tenures*, §§ 322, 323 (West, 1581). But see as to trespass *Fitzh. N. B.* 208 H, before the statutes giving partition. (The writ quoted in *Fitzh.* is in favor of a *prioreess* — hence before the suppression of the monasteries, 1536. This writ is not for breaking and entering the close but for *destroying* things in it, and so making the close useless, like the cases in *Coke* to be mentioned).

2. By stats. passed shortly after the dissolution of the monasteries,

technical reasons have so far given way that trespass for an ouster is in most States maintainable as well of goods as of lands.¹

In respect of personal property however it will be seen in the next chapter that an action for the conversion of the common chattel can be maintained in certain cases. The difficulty thus relates more to the form of action than to the substance of things. It may therefore be laid down, that for one tenant in common of personal property to withhold possession of the chattel from his associate, or to expel him from participation in the possession, or to appropriate to himself more than his share of the profits arising from the property, is a breach of legal duty to the latter, for which the law gives redress.²

It has been observed that, in order to maintain an action at common law for trespass to land, possession of the land at the time for the wrongful entry is necessary. But the common law does not allow a person who has wrongfully entered, to take and enjoy the profits

Entry and
possession by
relation.

31 Hen. 8, c. 1 (1539), and 32 Hen. 8, c. 32 (1540), partition was allowed between joint tenants and between tenants in common, of lands.

3. Coke thinks damages could be recovered for ouster; it was certain that trespass lay for *destruction* of the common property. Co. Litt. 199 b killing deer in deer park, or doves in dove-cot, the essential things of the common tenancy. See Fitzh. N. B., *ut supra* (published 1584).

4. In 1849 *Murray v. Hall*, 7 C. B. 441, ante, p. 373, held that trespass, lay for an *expulsion*, because ejectment lay, ejectment including trespass. See the precedents of declaration in ejectment, and the fact that ejectment is conclusive of the right to mesne profits. But the reasoning is far-fetched, though the rule is sound.

¹ The ejectment reasoning, as has just been stated in the last note, is far-fetched; the real reason is no doubt social change.

² The difficulty in the way of an action for trespass is that the defendant, tenant in common, had a right of possession, and that is inconsistent with that action. But in an action for the conversion of a chattel, it matters not that the defendant had a right of possession. The gist of such an action is not (as it is in trespass) the wrongful taking possession, but the conversion of the plaintiff's right.

of the land, or to commit depredations upon the premises during his occupancy, without a reckoning. If the owner or person entitled to the possession subsequently obtain possession of the land, the law treats him, by a fiction of relation, as having been in possession during all the time that has elapsed since he was ejected from the premises.¹

The consequence is, that upon his re-entry he becomes entitled to sue for the damage which he has sustained at the hands of the party who has usurped the possession. The remedy thus allowed is called an action for mesne profits; that is, for the value of the premises during the period in which the plaintiff has been kept out of possession by the defendant. The plaintiff is also entitled to recover for all wrongful entries upon and damages done to his property in the mean time.² For example: The defendant enters upon premises of the plaintiff, of which the plaintiff has been disseised, and removes buildings therefrom. The plaintiff subsequently re-enters, and then brings suit for damages done to his property. He is entitled to recover.³

There is conflict of authority in regard to the existence in the disseesee of a right of action for mesne profits against Descent or purchase: one who, before the plaintiff's entry, had succeeded the disseisor by descent or purchase; that stranger's liability for mesne profits. is, in the language of the law, against a stranger. On the one hand, it is said that to take a supposed title from another cannot be a trespass, and therefore mesne profits arising during the latter's occupation cannot be

¹ Here is a case of true constructive possession in realty. See ante, p. 368, note 3.

² *Liford's Case*, 11 Coke, 46, 51. As to cases between landlord and tenant see (under statute) *Smith v. Tett*, 9 Ex. 307; *Doe v. Harlow*, 12 Ad. & E. 40; *Doe v. Challis*, 17 Q. B. 166; *Pearse v. Coker*, L. R. 4 Ex. 92. Mesne profits may now be had in a suit to recover the land. See ante, p. 365.

³ *Dewey v. Osborn*, 4 Cowen, 329. This case shows also that the party on re-entry is in a position to sue for every entry upon his lands made without authority.

recovered of him.¹ On the other hand, the apparent injustice of this doctrine towards the owner has been urged, and the contrary conclusion reached.²

Between the extremes of these rulings however there is an important class of cases in this country, in regard to which there is little conflict. These are cases in which the defendant claims under one who has been let into possession under legal process. In cases of this kind it has been held that the defendant is not liable for mesne profits ; and it seems just, as well as conformable to the doctrine of trespass upon lands, that one who has obtained possession under the disseisor by process of law should be presumed to be rightfully possessed while the process (and the possession by virtue of it) continues in force. For example : The defendant enters and occupies land of the plaintiff under a writ of possession, executed against one who had wrongfully disseised the plaintiff. The writ is afterwards set aside, and the plaintiff resumes possession. The defendant is not liable for the profits consumed during his occupancy.³ Again : The defendant enters and takes possession of the plaintiff's land under a license from one who has been put into possession against a wrongdoer under a writ of restitution, which writ is afterwards quashed. The defendant is not liable for the mesne profits.⁴

It would seem also that purchasers, third persons, under judicial sales, should stand in a like situation ; for, though they do not acquire title from parties let into possession under legal process, they take through the sheriff, ^{Entry under judicial sale.} who may reasonably be presumed to have authority to sell. And there is judicial authority for this view.⁵ It would

¹ Liford's Case, 11 Coke, 46, 51 ; Barnett *v.* Guildford, 11 Ex. 19, 30 ; Case *v.* De Goes, 3 Caines, 261, 263 ; Van Brunt *v.* Schenck, 10 Johns. 377, 385 ; Dewey *v.* Osborn, 4 Cowen, 329, 338.

² Holcomb *v.* Rawlyns, 2 Cro. Eliz. 540 (decided before Liford's Case) ; s. c. L. C. Torts, 363 ; Morgan *v.* Varick, 8 Wend. 587.

³ Bacon *v.* Sheppard, 6 Halst. 197, following Menvil's Case, 13 Coke, 19, 21.

⁴ Case *v.* De Goes, 3 Caines, 361, following Menvil's Case, *supra*.

⁵ Dabney *v.* Manning, 3 Ohio, 321.

probably be otherwise if the purchaser should be the person who had instituted the invalid proceedings under which he was let into possession.¹

The non-liability of the purchaser or heir extends however only to profits consumed by him. If such person sow the Extent of land, or cut down trees, or grass, or crops, and liability. sever and carry them away, or sell them to another, the disseesee, after regress, may take the things severed wherever he can find them, or, if he cannot find them, recover their value of the person lately in possession. The regress of the disseesee has relation in law to the beginning of the last occupation, and the title to the things severed is therefore in him, which title the carrying away and disposing of cannot divest.²

§ 3. WHAT CONSTITUTES TRESPASS TO PROPERTY.

The gist of an action for trespass to land consists in the wrongful entry upon it, and so in interfering with the owner's Damage not (or tenant's) right of entire possession. Any entry necessary. upon land in the rightful possession of another, without license or permission, is a breach of duty to the possessor; and this too though the land be unenclosed. It follows that an action is maintainable for such an entry, though it be attended with no damage to the possessor. For example: The defendant without permission enters upon unenclosed land in the lawful possession of the plaintiff, with a surveyor and chain-carriers, and actually surveys part of it, but without doing any damage. The act is a breach of duty to the plaintiff, and the defendant is liable at least to nominal damages.³

¹ See further L. C. Torts, 362-366.

² See Liford's Case, *supra*. But of course if the owner take away the things severed, the defendant can recoup their value in trespass for the mesne profits. *Id.*

³ *Dougherty v. Stepp*, 1 Dev. & B. 371; *Hobson v. Todd*, 4 T. R. 71, 74. Buller, J.: 'The right has been injured.' Should the defendant repeat the offence, he may be made to smart for it in damages. *Williams v. Esling*, 4 Barr, 486.

The act is a breach of duty (though not in strictly technical sense a trespass) even if the close entered be a private way, if only the plaintiff has a right of passage along or ^{Easement interrupted.} across it; it matters not that the plaintiff has no right to the soil.¹ For example: The defendant deposits articles at various times in a passageway to the use of which he has no right, and the plaintiff has a right, though the ownership of the soil is in another. The defendant is liable; though he removes the articles in every instance before the plaintiff desires to pass out, and never in fact hinders the plaintiff in entering or in going out of the passage.²

A close is deemed to have been broken and entered even though the act was not in fact committed within it, but only against its bounds. To bring anything against such bounds without permission is a trespass. ^{Trespass to bounds of a close.} For example: The defendant, without permission, drives nails into the outer wall of the plaintiff's building, which stands upon the line of the plaintiff's premises. This is a breach of duty, for which the defendant is liable in damages.³ Again: The defendant heaps up dirt close to the plaintiff's boundary wall, and the dirt, of itself, falls against the wall. This is a trespass.⁴

An entry upon land, or a taking of goods, is justifiable when effected either (1) by license or consent of the party, or (2) by license of the law; a license being a mere permission to do what otherwise would be unlawful, and not a property right. The term 'license or consent of the party,' as here used, has reference to cases in which there is nothing beyond an actual consent, either in answer to a request for permission, or by specific or general ^{Justification of entry or taking goods : license.}

¹ The action under the old system was 'case,' not trespass. See post, p. 386 (3).

² Williams v. Esling, 4 Barr, 486.

³ Lawrence v. Obee, 1 Stark. 22.

⁴ Gregory v. Piper, 9 B. & C. 591.

invitation by the possessor; as e. g. in the case of a shop-keeper. Cases of this kind sufficiently explain themselves, and need not be dwelt upon. The term 'license of the law' has reference to cases in which a permission is given regardless of the will of the owner or occupant, including cases in which, in point of fact, there may at the same time be a license of the party, as for instance the case of an innkeeper who both invites and, generally speaking, must receive guests; enough that the license is paramount to the will of such person.

In cases of the first kind the license is revocable in respect of future acts, though it be made by contract, unless it is **License** 'coupled with an interest;' the licensor may be **coupled with** liable for breach of contract, and yet revoke the **an interest.** license, so as to take away the licensee's permission.¹ A license is 'coupled with an interest' when it comprises or is connected with a grant.²

The second kind needs some special explanation. The law licenses an entry upon the land of another, or the taking possession of another's goods, in many cases; and in **License by law: condition implied.** these the license cannot be revoked by the party affected. The first in importance of such cases is where the law has commanded the entry or the taking possession; the entry and levy of a sheriff by virtue of a valid precept being the chief example. In such cases reasonable force may be used to effect an entrance; though an entrance to an occupied dwelling-house cannot be forced, except for the purpose of serving criminal process.³ In cases in which the license of the

¹ *Horney v. Nixon*, 213 Penn. St. 20 (ticket to theatre a mere license); *McCrea v. Marsh*, 12 Gray, 211 (theatre ticket); *Johnson v. Wilkinson*, 139 Mass. 3; *Greenberg v. Western Turf Assoc.*, 140 Calif. 357; *Wood v. Leadbitter*, 13 M. & W. 838; *Hyde v. Graham*, 1 H. & C. 593. But the licensee may sometimes be entitled to an injunction against the revocation. *Frogley v. Lovelace*, Johns. 333.

² *Wood v. Leadbitter*, supra, at p. 844.

³ *Swain v. Mizner*, 8 Gray, 182; *Ilsley v. Nichols*, 12 Pick. 270; *Bailey v. Wright*, 39 Mich. 96; *People v. Hubbard*, 24 Wend. 369. Great exi-

law is only implied, forcible entry can seldom be made, except in the case of an owner of land entitled to take actual possession.¹ That is to say, apart from the exceptional cases, the license appears to be conditional; the entry may be made, provided that it can be made without breach of the peace.² The following are cases of the kind:—

One case is where an entry is made into an inn,³ or perhaps into the coach of a common carrier of passengers. Such an entry is lawful if the party is in a fit condition to be received, paying in advance, and in the case of a passenger, showing a ticket,⁴ when required.

Inns and
coaches of
common car-
riers.

A second case is where the party in possession of land has bound himself by debt to another, without any stipulation in regard to the place of payment. In such a case, the creditor is allowed by law to enter his debt- or's premises for the purpose of demanding payment.⁵

Entry by
creditor.

A third of these cases is where the party in possession holds, as tenant, a piece of real property of another. In such a case the law allows the latter to make an entry upon the land for the purpose of ascertaining

Entry by
landlord.

gency affecting the public, such as an extensive conflagration, would probably make another exception.

¹ Sampson *v.* Henry, 19 Pick. 36; Churchill *v.* Hulbert, 110 Mass. 42.

² Churchill *v.* Hulbert, *supra*. See Scribner *v.* Beach, 4 Denio, 448, 451. There are statutes everywhere imposing penalties for forcible entry upon premises. But the question is, whether a person, having a license to enter, is liable not only for the penalties but also as a trespasser. It appears to be clear that if the person entering is owner of the land, and entitled to take possession, he is liable only to the penalties of the statute. Sampson *v.* Henry, *supra*; Biddall *v.* Maitland, 17 Ch. D. 174; Edwick *v.* Hawkes, 18 Ch. D. 199. If however he should commit an assault upon the occupant, that, not being necessary to his entry, would make him liable for *that* act. Sampson *v.* Henry, *supra*. To enter forcibly in most other cases would be a trespass, because it would be in violation of the condition annexed by law to the license. See Churchill *v.* Hulbert, *supra*; Wheelden *v.* Lowell, 50 Maine, 499.

³ Six Carpenters' Case, 8 Coke, 146.

⁴ See Butler *v.* Manchester Ry. Co., 21 Q. B. Div. 207; Shelton *v.* Lake Shore Ry. Co., 29 Ohio St. 214.

⁵ Black. Com. iii. 212.

whether his interests are properly regarded by the possessor. For example: The defendant leases land to the plaintiff, and subsequently enters to see if the latter has committed waste. This is no breach of duty to the plaintiff.¹

A fourth case is where goods have been placed upon a man's land under a tenancy at will, or where goods have been sold which lie upon the premises of the vendor.

Entry by buyer of goods. In the absence of any special agreement or general custom concerning the delivery of the goods, the owner may go upon the premises and take them.² For example: The plaintiff lets premises to the defendant at will, on the terms that the defendant shall have reasonable time to remove his goods, after notice to quit. The defendant enters accordingly after termination of the lease, to get his goods, against the plaintiff's refusal to allow him. This is no breach of duty.³

A fifth case is where the owner of land has wrongfully burdened another with the possession of his (the former's) goods.

Entry by owner of goods left. In such a case the goods may be taken and put upon the owner's premises; and neither the taking of the goods nor the entry upon the owner's premises is unlawful. For example: The defendant takes an iron bar and sledge belonging to the plaintiff, and puts them upon the plaintiff's land; the plaintiff having first brought them upon the defendant's premises, and then, without permission, having left them there. The entry is lawful.⁴

A sixth case is where a man's goods, without his act, have got upon the land of another. In such a case the owner of the goods may enter and take them. For example: The defendant enters upon the plaintiff's land to get apples, which, by the action of the wind, have been blown *over* the line, from the defendant's

¹ Black. Com. iii. 212.

² Cornish *v.* Stubbs, L. R. 5 C. P. 334; Mellor *v.* Watkins, L. R. 9 Q. B. 400; McLeod *v.* Jones, 105 Mass. 403 (sale of goods on vendor's land).

³ Cornish *v.* Stubbs, *supra*.

⁴ Cole *v.* Maundy, Viner's Abr. Trespass, 516. See other cases there referred to.

trees into the plaintiff's close. The defendant is not liable.¹ Again: The defendant enters upon the plaintiff's land to get his own goods which the plaintiff has wrongfully taken and put there. This is lawful;² though it would have been otherwise had the plaintiff come properly into possession of the goods.³

A seventh case is where a person enters the premises of another to save life or to succor a beast in danger. Such an act is not a trespass; but it is said that the case would be different if the entry was made to prevent a person from stealing the owner's beast, or to prevent cattle from consuming his corn.⁴ The distinction made between the cases is that in the former case the loss of the animal would be irremediable, that is, that particular animal (which might be very valuable) could not be replaced; while in the latter case, the animal might be recovered from the thief, or the corn replaced by purchase or by a new crop: all corn being substantially alike. The distinction however sounds mediæval.

An eighth case is where a man creates, or after notice continues, a nuisance upon his premises, to the peculiar injury of his neighbor. In such cases the latter may enter and abate the nuisance. For example: The defendant enters upon the plaintiff's premises, and removes the eaves of a shed, which overhang the defendant's land and in rainy weather drip upon his premises. This is no breach of duty to the plaintiff.⁵

¹ *Millen v. Fawdry*, Latch, 119, 120. It would be otherwise if the defendant should shake the trees. Bacon's Abr. Trespass, F. The action of the wind would, it seems, be immaterial, if the branches *overhung* the plaintiff's land; for that would itself be a nuisance. Comp. Penruddock's Case, 5 Coke, 100 b. The defendant should be allowed to enter only when he is entirely in the right, as where the apples are blown over the fence into the plaintiff's grounds.

² Viner's Abr. Trespass, 1 (A); L. C. Torts, 382.

³ L. C. Torts, 381.

⁴ Bacon, *ut supra*.

⁵ Penruddock's Case, 5 Coke, 100 b; L. C. Torts, 383, where various distinctions as to such cases are mentioned.

A ninth case is where an entry has been made upon land of another by reason of necessity, without the fault of the person entering. Such an entry is justifiable. For example: The defendant runs into the plaintiff's premises to escape a savage animal, or the assault of a man in pursuit of him. The defendant is not liable.¹ Again: The defendant enters upon the plaintiff's premises to pass by a portion of the highway which at this point is wholly flooded, but without the act of the defendant. The entry is justifiable.²

It has already been seen that a trespass to property consists in an unlawful entry of land or taking of goods,³ and a trespass ab initio by imprisonment in an unlawful arrest. There is one case however in which, by reason of subsequent acts, a person may be treated as a trespasser notwithstanding the lawfulness of the entry or taking possession, or of the arrest; the result thus being to deprive the party of the justification of the lawfulness of the original act, and, by a fiction of law, to make him a trespasser ab initio. According to this fiction, one who has taken possession of goods, or entered upon land, by virtue of a license of the law, becomes a trespasser ab initio (notwithstanding the lawfulness of the levy or entry), where afterwards, while acting under the license, he commits an act which in itself amounts to a trespass.⁴ For example: The defendant, a sheriff, remains an unreasonable length of time in the plaintiff's house in possession of goods taken by him in execution. He is a trespasser ab initio.⁵

¹ Year Book, 37 Hen. 6, p. 37, pl. 26.

² *Absor v. French*, 2 Show. 28.

³ Where A's goods are unlawfully sold and delivered by B, must the former make demand for them before he can sue for the trespass? The question is not so important now as formerly, for suit is more generally brought in such cases for conversion. See post, p. 407.

⁴ *Six Carpenters' Case*, 8 Coke, 146; L. C. Torts, 386; *Beers v. McGinnis*, 191 Mass. 279.

⁵ *Ash v. Dawnay*, 8 Ex. 237; *Rowley v. Rice*, 11 Met. 337.

But, in order to become a trespasser ab initio, the subsequent act must, it has been held, be a technical trespass, or at least show a purpose to make use of the license as a mere cover for a wrongful act, or it should otherwise appear that the license was obtained as a mere subterfuge to conceal some improper purpose. If this is not the case, — if the entry was in good faith, and the subsequent act was not a trespass, — the party is not to be treated as a trespasser from the beginning, though the act committed be wrongful and subject him to liability. For example: The defendant, an officer, enters upon the plaintiff's premises by virtue of a lawful writ, to make a levy for debt. While there, in the course of his business as an officer, he wrongfully extorts money from the plaintiff. He is not a trespasser from the beginning of his entry, though the extortion was a breach of duty for which he would be liable in damages; extortion not being a trespass.¹ Again: The defendant refuses to drop a distress on the plaintiff's goods, upon due tender by the plaintiff of the rent due. The defendant is not a trespasser.²

These examples, on consideration, will show the importance of the doctrine of trespass ab initio. If the person's conduct make him obnoxious to this doctrine, it follows probably that all acts done, such as, in the case of an officer, levies made, intermediate the entry and the trespass, are void; since, his entry being a trespass,

Significance
of trespass ab
initio.

¹ *Shorland v. Govett*, 5 B. & C. 485. See *Six Carpenters' Case*, *supra*. But compare *Holley v. Mix*, 3 Wend. 350. If the entry under the writ was merely to cover the purpose to extort, there would probably be a trespass ab initio. Compare *Grainger v. Hill*, 4 Bing. N. C. 212, ante, p. 344, note. That, it seems, suggests the true distinction. *Six Carpenters' Case*, *supra*. See also *Westminster v. London & Northwestern Ry.*, 1905, 2 Ch. 426, 439–440, Lord Lindley; *Commonwealth v. Rubin*, 165 Mass. 453, Holmes, J. The doctrine is applicable only to cases in which there has been an ‘abuse of some special and particular authority given by law,’ as in the case of process. *Esty v. Wilmot*, 15 Gray, 168. The exercise of the power given is *conditional* upon keeping wholly within legal limits. *Id.*, Hoar, J.

² *West v. Nibbs*, 4 C. B. 172.

he could not, according to general principles of law, thereafter do an act against the will of the occupant which would be legal.¹ Besides, he would be liable for the entry as well as the after acts. The doctrine does not therefore concern the form of remedy alone.

This doctrine of trespass ab initio applies however only against persons who have entered or taken goods by license ^{Limitation of} of law. A person cannot treat as a trespasser ^{the doctrine.} from the beginning one to whom he has himself given permission to enter or take his goods, whatever be the nature of his subsequent acts.² For example: The defendant, by permission of the plaintiff's wife, enters the plaintiff's house in his absence, and while there wrongfully gets possession of papers, and carries them away. This does not make him a trespasser ab initio.³

As where the entry was made in good faith the subsequent act must amount to a trespass, it becomes necessary to ascertain somewhat precisely the technical signification ^{Meaning of} trespass. of that term. It is difficult to define a trespass, but the following will serve to indicate the proper meaning of the term: (1) Any wrongful intended contact with the person is a trespass. (2) Any wrongful entry upon the plaintiff's land or interference with the plaintiff's possession of personality is a trespass. (3) Any wrongful act committed directly with force is a trespass, though no physical contact with the person of the plaintiff or with his property be produced; as in

Compare *Ilsley v. Nichols*, 12 Pick. 270, denying certain dicta of the books. *Ilsley v. Nichols* decides that a levy made by breaking open the outer door of an occupied dwelling-house (a house is a man's castle) is invalid, and the officer is liable for the value of the goods taken as well as for the unlawful entry. The same result should in principle follow if, by an act subsequent to the entry, he become a trespasser from the beginning.

² *Six Carpenters' Case*, supra; *Esty v. Wilmot*, 15 Gray, 168; *Allen v. Crofoot*, 5 Wend. 506.

³ *Allen v. Crofoot*, 5 Wend. 506.

the case of an imprisonment without contact, or the firing a gun under the plaintiff's window, to alarm the inmates of his house. In cases like these, force is said to be implied. Upon the same ground, the seduction of the plaintiff's wife, daughter, or servant might perhaps be considered as a trespass, and the act was formerly so treated by the courts;¹ the consent given was not the plaintiff's consent. But the present view is different.²

On the other hand, (1) a mere non-feasance (that is, a pure omission) cannot be a trespass;³ (2) nor can there be a trespass where the matter affected was not tangible, and hence could not be immediately injured by force, as in the case of an injury to reputation or health; (3) nor can there be a proper trespass where the right affected is incorporeal, as a right of common or way; (4) nor where the interest injured exists in reversion or remainder; (5) nor where there is no right of action immediate upon the act in question.⁴

Lastly, to constitute a trespass to property, the thing affected must be capable of ownership as property; and in some cases it must have been in the plaintiff's possession at the time. Wild animals, untamed, are deemed property only while in one's actual or constructive possession; upon effectual and final escape, they cease to be property so long as they are free. Any one may now kill or take them. Indeed a savage domestic animal straying at large, and dangerous, may be killed, though the owner be known to be in pursuit.⁵

Things which
are not
property.

A man may have property in a dog even though the animal

¹ *Tullidge v. Wade*, 3 Wils. 18; *Chitty, Pleading*, i. 126, 133.

² *Macfadzen v. Olivant*, 6 East, 387. *Chitty* prefers the old doctrine. *Pleading*, i. 133.

³ *Six Carpenters' Case*, 8 Coke, 146.

⁴ See *Chitty, Pleading*, i. 166. But quære whether the effect of the rule of trespass ab initio might not be had in some of these cases, as in the third and fourth?

⁵ *Kent, Com.* ii. 348, 349.

may not have any certain pecuniary value.¹ The same is probably true of rare animals kept for study, for exhibition, for breeding, or even as pets.² No one therefore has a right to take these from the owner, or to keep them from him when taken up as strays,³ or needlessly to kill them.⁴ But there are circumstances when the law justifies the killing of another's animals; a man may not only protect himself or another from the attack of a beast, he may kill an animal, in some cases, which is doing mischief, as a dog which is biting or worrying his sheep or other valuable animals or fowls.⁵ Indeed, a savage dog, suffered to run at large without a muzzle, and disposed to attack or snap at people, may be treated as a nuisance and killed by any one; and that too whether at the time the dog was doing harm or not.⁶

A man may however keep a ferocious dog as a watch over his premises, if properly secured; while the dog is in such a situation, no one may lawfully kill it, unless indeed it is then making an attack upon man or beast.⁷ It would doubtless be lawful to kill the dog to save the life even of a burglar.

A word may be added in regard to trespassing animals. The law is very plain and natural; trespassing will seldom ~~trespassing~~ justify killing or maiming,⁸ or even detaining upon ~~animals~~ a claim for anything more than reimbursement of necessary expenses and payment of damage done. And if detained, the animals must be taken care of and properly treated.⁹

¹ *Dodson v. Meek*, 4 Dev. & B. 146; *Wheatly v. Harris*, 4 Sneed, 468.

² See *Amory v. Fly*, 10 Johns. 102, as to wild animals tamed.

³ *Id.*

⁴ *Dodson v. Meek* and *Wheatly v. Harris*, *supra*.

⁵ *King v. Kline*, 6 Barr, 318; *Woolf v. Chalker*, 31 Conn. 121; *Brown v. Hoburger*, 52 Barb. 15.

⁶ *Putnam v. Payne*, 13 Johns. 312; *Maxwell v. Palmerston*, 21 Wend. 407; *Brown v. Carpenter*, 26 Vt. 638.

⁷ See *Perry v. Phipps*, 10 Ired. 259.

⁸ See *Aldrich v. Wright*, 53 N. H. 398, an important case, in which a killing was held lawful.

⁹ *Murgo v. Cogswell*, 1 E. D. Smith, 359.

On the other hand, if driven away, that must be done without unnecessary violence ; such violence would be a trespass. For example : The defendant, finding the plaintiff's horse straying upon his premises, sets a savage dog upon it, and the horse is seriously hurt. The defendant is liable in damages.¹

¹ *Amick v. O'Hara*, 6 Blackf. 258.

CHAPTER XIII.

CONVERSION.

Statement of the duty. A owes to B the duty not to exercise dominion (1) over B's general property in personal chattels; (2) over B's special property in the like things.

By 'general property' is commonly meant the ownership of property, subject, it may be, to a special property for a time in another.

By 'special property' is meant a right of possession coupled with possession; the right being general, as in the case of a lien creditor, or limited, as in the case of a finder.

By 'bare possession' merely is commonly meant a mere custody ('detention') or a possession unlawfully obtained.

The action for converting goods to one's own use has always been called 'trover,' a term meaning 'to find,' which was used in the old precedents of declaration; the plaintiff, by a fiction, alleging that he had lost and the defendant had *found* and converted to his own use the chattel in question. This fiction was resorted to in cases of bailment or the like, to avoid the objection that the defendant had received the goods from the hand of the plaintiff.¹ The judges received

¹ According to the old theory the wrong must have been done to the plaintiff's possession, and hence it was fatal to any action of the kind that the plaintiff had delivered possession to the defendant. If, in respect of possession, the conversion had originally been deemed enough, there would have been no need of the invention of the fiction of loss and finding.

Such common cases as actions for the taking of straying cattle may have suggested the idea of the fiction. See L. C. Torts, 422.

the allegation accordingly, and did not require proof of it; proof of the conversion therefore was enough.

The action of 'trover' is an action to recover (not specific articles, but) damages for the conversion of chattels personal, to the value of the interest converted.

By an 'act of dominion' is meant an act of, or tantamount to, ownership.

The old action of detinue has not been much used in modern times because of its inconvenience; it requires exact description of the property detained, a thing sometimes difficult to give. Its object is to recover chattels in specie, or damages for their non-return if they cannot be had, and damages for the wrongful detention. It has been superseded largely by the more convenient statutory action of replevin and by trover. Detinue too could be defeated formerly by compurgation, while trover could not. The principles set forth in this chapter apply, generally speaking, to all three of these actions.

As in trespass, so in trover, detinue, and replevin, the thing alleged to have been converted must be capable of ownership as property.¹

§ 1. WHAT MUST BE PROVED.

The plaintiff is entitled to recover by proving that the defendant took and converted to his own use goods of which the plaintiff was in possession or entitled to take possession at the time of the conversion or because of that act.

§ 2. POSSESSION.

The possession of a chattel personal, that is, of a movable article, or a right to take possession thereof, is necessary to support an action for conversion, just as it is to support an action for trespass. The plaintiff fails in trover if it appear that he has never acquired a right of possession, or if he has, that

Possession
necessary to
action for
conversion.

¹ See ante, p. 387.

he has parted with it, and has not before suit become re-invested with the same. For example: The plaintiff is the purchaser of goods, which however remain in the seller's possession subject to a lien for the purchase price. The defendant, without authority, removes the goods from the seller's possession, doing no permanent injury to them. This is no breach of duty to the plaintiff.¹ Again: The defendant, a sheriff, wrongfully levies upon goods of the plaintiff in the hands of a lessee of the property, and carries the goods away. The plaintiff cannot treat the act as a conversion (though the tenant could), since the plaintiff was not entitled to the possession of the property.²

On the other hand, the right to the possession of the chattels is sufficient to enable the general owner to sue for a conversion thereof, though he may not have the actual possession at the time of the wrongful act; because, as was stated in the preceding chapter, the right to take possession of goods draws possession in law. For example: The defendant buys and takes away a chattel belonging to the plaintiff from A, who had no right to sell it. The plaintiff, being the owner, is deemed to have been in possession of the chattel at the time of the conversion by the defendant.³

A person having 'special property' in goods, with general right of possession, can maintain an action for conversion against all persons who may wrongfully exercise dominion over them, though the act be done by command of the owner of the goods. For example: The defendant takes a horse out of the possession of the plaintiff, the plaintiff having a lien upon the animal. The defendant acts by direction of the owner, but without other authority. He is liable for conversion of the horse.⁴

¹ *Lord v. Price*, L. R. 9 Ex. 54.

² *Gordon v. Harper*, 7 T. R. 9. See *Farrant v. Thompson*, 5 B. & Ald. 826; *ante*, p. 371.

³ *Hyde v. Noble*, 13 N. H. 494; *Clark v. Rideout*, 39 N. H. 238; *Carter v. Kingman*, 103 Mass. 517.

⁴ See *Outcalt v. Durling*, 1 Dutch. 443. The form of action in this

It follows that a person having a special property in goods, together with general right of possession of them, may maintain an action against the owner himself for any unpermitted disturbance or refusal of his possession; since, if the owner cannot give an authority to another to take the goods, he cannot take them himself. For example: The defendant, owner of a title-deed, in the possession of the plaintiff under a temporary right to hold it, takes it by permission of the plaintiff for a particular purpose, and then, during the continuance of the plaintiff's right to hold it, refuses to redeliver it. The defendant has violated his duty to the plaintiff, and is liable for conversion.¹

One who has possession of chattels, though without a right to hold them against the owner, is also protected against all persons having neither a right of property nor of possession. The mere fact that the possessor of goods has no right to hold them against persons having a general or higher special property in the goods, gives no privilege to a stranger to interfere with the party's possession. So to interfere would be a breach of duty to the possessor which would render the person interfering liable for the value of the goods. For example: The defendant, a stranger, refuses to return to the plaintiff a jewel, which the latter has found and shown to the defendant. The defendant's act is a breach of duty to the plaintiff, and he is liable for the value of the jewel.²

It would be different however if the defendant acted under express authority of the owner, or of one entitled to the possession of the property. But it is laid down that the defendant could not set up the rights of a third *jus tertii*.

case was trespass, but it might as well have been trover. The injured party could sue in either form in such cases.

¹ Roberts *v.* Wyatt, 2 Taunt. 268.

² Armory *v.* Delamirie, 1 Strange, 505.

latter.¹ That is, the defendant can deny the plaintiff's right only by showing a better right in himself.²

The finding of a chattel does not however in all cases give a right to hold the article against all persons having no right of property in it; though the finding and taking possession were not unlawful as against the loser. **Finding.**

The chattel may be found upon the premises of another, in such a situation as to indicate that it was voluntarily put in possession of the owner of the premises. When this is the case, the possession of the article is deemed to be in the occupant of the premises, and not in the finder. The former can therefore maintain an action for conversion against the latter, should he refuse to surrender to him the chattel. For example: The defendant, a barber, receives from the plaintiff, a customer in his shop, a pocket-book containing money, which the plaintiff has discovered lying upon a table in the defendant's shop. The plaintiff, in handing the pocket-book to the defendant, tells him to keep it until he can discover the owner, and then return it to the loser. No one having called for the article, the plaintiff claims it, and the defendant refuses to give it to him. This is not a breach of duty to the plaintiff, since the fact that the pocket-book was left upon the defendant's table indicates that the owner put it there by intention, and so put it into the defendant's keeping or possession.³

If however the chattel be found in a position which indicates that it could not have been purposely put there, but must have been unintentionally parted with, and so truly lost the moment it escaped the owner, it does not fall into the keeping or possession of the occupant of the premises unless he (or

¹ *Rogers v. Arnold*, 12 Wend. 30 (suit to recover the chattels specifically); *Cheney v. Pierce*, 7 Allen, 485; *Vining v. Baker*, 53 Maine, 544; *Kane v. Hutchisson*, 93 Mich. 488; *Montgomery v. Brush*, 121 Ill. 513; *Jefferies v. Great Western Ry. Co.*, 5 El. & B. 802; *Cheesman v. Exall*, 6 Ex. 341. But see *Stephenson v. Little*, 10 Mich. 433; *Boyce v. Williams*, 84 N. Car. 275, 37 Am. Rep. 618.

² *Hubbard v. Lyman*, 8 Allen, 520; *Landon v. Emmons*, 97 Mass. 37.

³ *McAvoy v. Medina*, 11 Allen, 548.

his servant) first discover it there. If another first find it, the possession, as between himself and the occupant, is in him, the finder.¹ For example: The defendant, a shop-keeper, receives from the plaintiff a parcel, containing bank-notes, which the latter has picked up from the *floor* of the defendant's shop; the plaintiff, on handing the parcel to the defendant, telling him to keep the same till the owner claims it. The defendant advertises the parcel, but no one claims it, and three years having elapsed, the plaintiff requests the defendant to return to him the bills, at the same time tendering the cost of advertising, and even offering an indemnity. The defendant refuses. This is a breach of duty to the plaintiff, and the defendant is liable to him for conversion of the parcel.²

The term 'possession' has the same meaning here, and indeed everywhere in the law of torts, that it has in cases of trespass.³ Thus, a servant can, it seems, only hold; the possession is the master's. For example: The defendant takes goods out of the hands of the plaintiff, a sheriff's deputy, without authority. The act is deemed not a breach of duty to the plaintiff, since he is but a servant, and so holds not in his own right;⁴ though it would be otherwise in regard to the sheriff.

Possession
here has the
same meaning
as in trespass.

§ 3. WHAT CONSTITUTES CONVERSION.

It has been seen that conversion consists in the exercise of an act of dominion over the movables of another; that is, it is a usurpation of ownership. It matters not whether this was done with or without knowledge of the true state of the title, as will be seen; every man acts at his

¹ South Staffordshire Water Co. v. Sharman, 1896, 2 Q. B. 44; Bridges v. Hawkesworth, 21 L. J. Q. B. 75.

² Bridges v. Hawkesworth, *supra*.

³ *Ante*, p. 369. The meaning there ascribed to the term is intended to be of the widest application, where the possession is real.

⁴ Hampton v. Brown, 13 Ired. 18, *ante*, p. 369.

peril in exercising dominion over property.¹ The distinction between trespass and conversion consists in this, that trespass is an unlawful taking, as for the mere sake of removing the property, while conversion is an unlawful taking or keeping in the exercise, legally considered, of the right of ownership.²

Acts of dominion appear in two forms: first, where the wrongdoer appropriates to himself the goods of another; secondly, where, without appropriating them to himself, he deprives the owner, or person having the superior right, of their use, by an act of ownership.

The most common illustration of an act of dominion in the first form is the case of a sale and delivery of goods, made without authority of the owner. Every sale without restriction by a person having no right to sell authority. is a conversion, if followed by delivery,³ and renders the vendor liable in an action of trover.⁴ For example: The defendant, an officer, levies upon goods as the property of a third person, some of which belong to the plaintiff, takes them away, after being informed of the plaintiff's claim, and sells the whole. This is a conversion of the plaintiff's goods; though it would have been otherwise had the goods been mixed by the plaintiff with those of the third person,⁵ and a separation not offered by the plaintiff.⁶

The same consequence follows where, having authority to make a sale, the party selling transgresses his right; since to do so is to assert that he may sell according to his own will, and that is to exclude the rights of all others. For example:

¹ See a qualification stated in *Hollins v. Fowler*, L. R. 7 H. L. 757, 768, by Lord Blackburn, in regard to dealing with goods at the request of a person having actual custody of them, in the bona fide belief that such person is owner, or has the owner's authority.

² See *Bushel v. Miller*, 1 Strange, 129; *Fouldes v. Willoughby*, 8 M. & W. 540, 551, Rolfe, B.

³ See *Consolidated Co. v. Curtis*, 1892, 1 Q. B. 495, 498.

⁴ Quære, whether a demand would be necessary? See post, p. 407.

⁵ *Gilman v. Hill*, 36 N. H. 311.

⁶ See *Kent*, Com. ii. 365.

The defendant, an officer, makes, unnecessarily, an excessive levy upon the plaintiff's goods, under a valid writ, and sells them. This is a conversion, since it is done in disregard of the defendant's authority, and according to the party's own will.¹

This principle that the sale of property with delivery is an act of dominion so as to render the seller liable for conversion if he had no right to sell as he did, applies equally whether the vendor knew or did not know the true state of the title, or the actual limit of his authority. Liability for converting the goods of another to one's own use does not depend upon the intent of the party exercising the act of dominion. For example: The defendant sells and delivers a horse of the plaintiff to a third person, the defendant having bought the animal from one who had no title to it, though the defendant supposed the contrary, and supposed himself to be owner of the horse at the time of the sale in question. The defendant is liable for conversion.²

Where the purchaser's vendor had acquired his supposed title from the plaintiff by means of a sale effected by false, or even by fraudulent, representations, the case would be different. Fraud of this character renders the sale voidable merely, not void; the consequence of which is, that the defrauded party has a right to rescind the sale only so long as the property remains in the hands of the buyer from himself, or of any one claiming under him who is not a purchaser for value without notice.³ Inasmuch as the buyer, notwithstanding his fraud, acquired the title to the goods, he can convey

Ignorance of title : intention.

Title acquired by fraud : purchase for value without notice.

¹ *Aldred v. Constable*, 6 Q. B. 370, 381. See *Sommer v. Wilt*, 4 Serg. & R. 19; *Stewart v. Cole*, 46 Ala. 646. So to pledge the goods of another without authority. *Carpenter v. Hale*, 8 Gray, 157.

² *Harris v. Saunders*, 2 Stroh. Eq. 370, note; *Carter v. Kingman*, 103 Mass. 517. See *McCombie v. Davies*, 6 East, 538; *Hilbery v. Hatton*, 33 L. J. Ex. 190; *Fowler v. Hollins*, L. R. 7 Q. B. 616; s. c. 7 H. L. 757.

³ *Clough v. Northwestern Ry. Co.*, L. R. 7 Ex. 26.

that title ; and more, he can convey a better right than he had himself, provided he sell to a purchaser for value without notice.

Hence, not only would such purchaser be free from liability in refusing to return the goods to the defrauded party, but should that party obtain possession of them and refuse to deliver them to the purchaser from the intermediate seller, he (the defrauded party) would himself be liable in trover. For example : The defendants, having previously been owners of a quantity of iron, sell the same to P, who gives them a fraudulent draft (supposed by the defendants to be good) for the amount due for the property. P then sells the iron to the plaintiff, who buys for value, and without notice of the fraud. Subsequently, the defendants discover the fraud, and send their servant to take away the iron, now lying in port in a lighter alongside the plaintiff's wharf. The servant takes away the lighter and brings the iron therein to the defendants. The plaintiff has acquired a good title to the iron, and the defendants are guilty of a conversion.¹

There are other cases in which a person may by purchase for value and without notice acquire a better right than his vendor had. A purchaser of goods from one who has by the terms of sale reserved the right to buy back the property within a certain time, acquires (or may by such a transaction acquire) the title to the property, and, having a good title, he may convey the same to one who purchases for value and without notice, so as to cut off the original owner's right to repurchase. The consequence is, that the last purchaser is not guilty of a conversion by refusing to let the original owner have the goods upon a tender by him of the amount he was to pay for them, though made within the time agreed upon between him and his buyer. The case would be different however in regard to the buyer from the original owner. His

¹ *White v. Garden*, 10 C. B. 919. See for the converse case *Cundy v. Lindsay*, 3 App. Cas. 459.

act in making the sale would indeed be lawful against the seller, if the seller should never offer to repurchase ; but if the seller should offer to repurchase, and tender the price, his purchaser would be bound to return to him the goods, and, in case of failure, would be liable according to the terms of the contract.

If however the sale were upon condition that the title should not pass until the performance of some condition, the party, not having acquired the title, could not ^{Conditional sale.} convey it ; and an attempt to do so by a sale and delivery would, by the better rule, subject the buyer to liability for conversion.¹ For example : The defendants purchase furniture from W, who had taken possession of the same upon an agreement that he should keep it six months, and if within that time he should pay a certain sum for it, it should be his ; otherwise, he was to pay twenty-five per cent of the price for the use. The sale to the defendants is made shortly after W takes possession of the furniture and before payment for it. A refusal by the defendants to restore the property to the plaintiff is a breach of duty to him, and makes them liable for the value of the furniture.²

According to the later authorities, the holder of a pledge or pawn has such an interest in the chattel that he can dispose of the same by sale or repledge without subjecting ^{Sale of pledge.} the purchaser or repledgee to *trover*, and without subjecting himself thereto, except in either case upon a failure to produce the pledge or pawn upon tender of the debt to secure which the chattel was given.³ For example : The de-

¹ *Sargent v. Gile*, 8 N. H. 325 ; *Smith v. Wood*, 63 Vt. 534 ; *Johnston v. Whittemore*, 27 Mich. 463 ; *Bryant v. Kenyon*, 123 Mich. 151 ; *Rodney Machine Co. v. Stewart*, 57 Hun, 545. But see contra, *Vincent v. Cornell*, 13 Pick. 294.

² *Sargent v. Gile*, 8 N. H. 325, denying *Vincent v. Cornell*, 13 Pick. 294. According to the latter case, the conditional buyer would, by the sale, transfer his own right, such as it was. See *Coggill v. Hartford R. Co.*, 3 Gray, 545 ; *Deshon v. Bigelow*, 8 Gray, 159.

³ *Donald v. Suckling*, L. R. 1 Q. B. 585 ; *Halliday v. Holgate*, L. R. 3 Ex. 299 ; *Stevens v. Wiley*, 165 Mass. 402 ; *Lawrence v. Maxwell*, 53

fendant has taken in pledge from S certain bonds, which the plaintiff had pledged to S for the security of a debt smaller than the amount of the debt of S to the defendant; the re-pledge being made before the maturity of the original debt,¹ and before payment or tender thereof. The refusal of the defendant to return the bonds to the plaintiff except on tender to the defendant of the amount due to S is not a *conversion* by the defendant; nor would the act of S amount to a conversion, unless upon tender of the debt due to him he should fail to return the bonds.²

One who has a special property in goods may or may not be able to dispose of his interest therein, according to the nature of his interest. Not every form of special property is alienable. In many cases of bailment the special objects to be effected forbid that the bailee should have an assignable interest. Such is the case (1) where the bailment is made upon a trust in the personal skill, knowledge, or efficiency of the bailee. Such is the case (2) where the bailee has a mere lien upon the goods intrusted to him. And such is the case (3) where the bailment is at the bailor's will. In any of these cases any attempt by the bailee to assign his interest in the property, followed by delivery of possession, puts an end at once to the bailment. The consequence is, that the assignee acquires no title or right, and becomes liable on refusing to surrender the goods to the owner, even if not by merely taking them.

There is however a large class of bailments where the trust

N. Y. 19; *Blood v. Erie Savings Co.*, 164 Penn. St. 95; *White Mountains R. Co. v. Bay State Iron Co.*, 50 N. H. 57; *Haber v. Brown*, 101 Calif. 445; *Allen v. Dubois*, 117 Mich. 115; *Nelson v. Owen*, 113 Ala. 372.

¹ That is, while the bonds were still subject to redemption by the plaintiff.

² *Donald v. Suckling*, L. R. 1 Q. B. 585. To pledge, without authority, another's property held in simple bailment would be a very different thing. *Carpenter v. Hale*, 8 Gray, 158, *infra*, p. 403. Note also the distinction in *Post v. Union Bank*, 42 N. E. Rep. 976 (Ill.); *Carpenter v. Dresser*, 72 Maine, 377, in *case*.

is accompanied with other incidents than those pertaining to a simple bailment, and where there is no element of personal trust, and none of the characteristics of an estate at will; and in this class it is clear that the bailee has an assignable interest. There can be no conversion therefore in the act of transferring such an interest merely, provided the assignee claims only the rights of the assignor; because the latter, having exercised no act of dominion over the property, but having dealt simply with his own interest, did not reinvest the owner with a right of possession. An attempt by the bailee to dispose of the goods absolutely however would be different, if followed by a delivery of them. For though a bailee could not, without fault on the part of the owner (by holding him out as having a right to sell absolutely), dispose of anything beyond his own interest, the attempt to do so, followed by the overt act, would be to exercise dominion over the goods.¹

It is not always necessary that there should be an appropriation of the entire property held in order to effect a conversion of the whole. If the part appropriated be necessary to the use of the rest in the purpose to which the whole was to be put, as by rendering an intended sale impracticable except at a sacrifice, the part appropriation, if wrongful, *may*, it seems, be a conversion of the whole.² For example: The defendant, a bailee by the plaintiff of wine in casks for sale by the cask, consumes part of the wine in one cask. This may (probably) be treated as a conversion of all the wine in that cask.³ Again: The defendant finds a raft of timber belonging to the plaintiff

Conversion of
part of a lot of
goods.

¹ See *ante*, p. 396: *Lancashire Wagon Co. v. Fitzhugh*, 6 H. & N. 502; *Cooper v. Willomatt*, 1 C. B. 672.

² *Philpott v. Kelley*, 3 Ad. & E. 106; *Gentry v. Madden*, 3 Pike, 127; *Bowen v. Fenner*, 40 Barb. 383; *Brown v. Ela*, 67 N. H. 110.

³ *Philpott v. Kelley*, 3 Ad. & E. 106, *semel*. The case was not so strong as the facts put in the example. See *Clendon v. Dinneford*, 5 Car. & P. 13; *Gentry v. Madden*, 3 Pike, 127.

lodged on a sandbar in a stream, takes possession of it, hires a man to assist him in removing part of it, and sells the rest to him, reserving the part removed. This may be treated as a conversion of the whole raft.¹

It appears to be immaterial to the plaintiff's right of recovery for the whole, that what remains is still in itself as good as if there had been no severance; the plaintiff has the right to the benefit to be obtained from it in its entirety, where that is a special benefit. This principle would apply to cases where separate articles are delivered under one entire contract of bailment or lease, even though the articles be separately enumerated and valued. The bailment or lease is still indivisible in contemplation of law, and conversion of part may be conversion of the whole.²

If however separate articles be severally bailed or leased, by distinct contracts, though all be delivered and bargained for at the same time, the rule of law is probably different; a conversion of one of the articles or parts would not in such a case operate as a conversion of the whole.

If the owner of goods stand by and permit them, without objection, to be sold as the property of another, the purchaser acquires a good title, and is not liable to the owner for a refusal to deliver them to him.³ For example: The defendant purchases machinery of M, the legal title to which at the time of the sale is in the plaintiffs. The machinery is sold under a levy of execution against M, and the plaintiffs, though having notice of the levy, and having repeatedly conversed about it, before the sale, with the attorney of the party who made the levy, never laid any claim to the property until after the sale. The defendant's refusal to surrender the machinery to the plaintiff is not a breach of duty.⁴

¹ *Gentry v. Madden*, 3 Pike, 127.

² See *Clendon v. Dinneford*, 5 Car. & P. 13; *Gentry v. Madden*, supra.

³ *Pickard v. Sears*, 6 Ad. & E. 469; *Stephens v. Baird*, 9 Cowen, 274; *Dezell v. Odell*, 3 Hill, 215.

⁴ *Pickard v. Sears*, 2 Ad. & E. 469.

Appropriating an article held in bailment to a use not contemplated at the time of the contract of bailment and not authorized by law, may constitute conversion. Unauthorized use, etc. For example: The defendant hires of the plaintiff a horse to ride to York, and rides it beyond York to Carlisle. This is a conversion of the animal, entitling the plaintiff, on return of the property, at least to nominal damages, and to actual damages if any loss be in fact sustained by reason of the act.¹ Again: The defendant lends money to E, taking from him by way of security a quantity of leather, which had been placed in E's hands by the plaintiff to be made up into boots, on hire. The defendant refuses to surrender the leather to the plaintiff. He is guilty of conversion.² Again: The defendant receives from the plaintiff shares of stock to be sold on commission. Instead of selling, the defendant exchanges the stock for other property. This is a conversion.³

It has sometimes been supposed that there can be no right of action for conversion in such cases, unless the chattel was injured in the misappropriation.⁴ But there is Damage to the property. ground for doubting the correctness of this doctrine. The foundation of the action is the usurpation of the owner's right of property. It is true, the plaintiff in trover seeks to recover the value of the thing converted, but if he has received it back, or possibly if it has been tendered back in proper condition,⁵ he will be allowed to recover no more

¹ Isaack *v.* Clark, 2 Bulst. 306; Perham *v.* Coney, 117 Mass. 102.

² Carpenter *v.* Hale, 8 Gray, 157.

³ Haas *v.* Damon, 9 Iowa, 589. The buyer would not be liable if the act was within the general scope of the agent's authority, and without notice of the breach of duty.

⁴ Johnson *v.* Weedman, 4 Scam. 495; Harvey *v.* Epes, 12 Gratt. 153. In the first of these cases a horse which the defendant had converted died on his hands, directly after but not in consequence of the conversion. It was held that the owner had no cause of action. The plaintiff was not entitled to recover the value of the horse, but he had a cause of action, it should seem.

⁵ There is much doubt of the right to tender back the converted chattel, though it has not been injured, especially if the conversion was

(beyond nominal damages) than the amount of his loss.¹ But conversion itself is a cause of action ; it is not necessary to prove special damage.

In all the foregoing cases it will be observed that there is something more than an assertion, by word of mouth, of dominion over the chattel. An assertion alone, not followed by any act in pursuance of it, such as a refusal to surrender the chattel to the person entitled to possession, would not amount to a conversion. There must be some unauthorized interference with the plaintiff's right of possession. Even an attempted exercise of dominion, without right, appears to be insufficient to constitute a conversion, if the owner's right was not in fact interrupted. For example : The defendant, by an officer, makes a declaration of attachment of goods which he knows is already duly levied upon by the plaintiff, has a keeper appointed and then *suffers* the owner of the attached property to take it away and sell it, and receives part of the avails. This is deemed not a conversion.²

Thus far of cases in which the defendant has appropriated the goods in question to his own use. But, as has been stated, a wrongful act of dominion may be committed without so appropriating the goods. It is 'wilful.' See *Hart v. Skinner*, 16 Vt. 138; *Green v. Sperry*, id. 390. But see *Delano v. Curtis*, 7 Allen, 470, 475. Further see *Yale v. Saunders*, 16 Vt. 243; *Stephens v. Koonce*, 103 N. Car. 266. The true view of the case appears to be that the party wronged has an election whether to treat the wrong as a conversion or not, and the question then is whether he has exercised his election.

¹ *Fisher v. Prince*, 3 Burr. 1363; *Earle v. Holderness*, 4 Bing. 462; *Cook v. Hartle*, 8 Car. & P. 568; *Hewes v. Parkman*, 20 Pick. 90, 95. Judgment for the plaintiff in trover does not vest the property in the defendant. *Lovejoy v. Murray*, 3 Wall. 1; *Brady v. Whitney*, 24 Mich. 154; *Brinsmead v. Harrison*, L. R. 6 C. P. 584.

² *Polley v. Lenox Iron Works*, 2 Allen, 182, adopting the language of Heath, J., in *Bromley v. Coxwell*, 2 B. & P. 438, that 'to support an action of trover there must be a positive tortious act.' Here the defendant was merely 'suffered' to take and sell the property.

enough that the defendant has wrongfully deprived the plaintiff of the possession of his goods or usurped his rights over them, though for the benefit of a third person.

In cases of this kind it was formerly supposed that an intention to deprive the plaintiff of his goods was necessary; but this has been decided to be incorrect. The question still is whether there has been a wrongful exercise of dominion by the defendant; if there has been an unauthorized act which deprived the plaintiff of his property permanently or for an indefinite time, there has been a conversion.¹ If not, the contrary is true. For example: The defendant, manager of a ferry, receives on board his boat the plaintiff, with two horses. Before starting, the plaintiff is reported to the defendant as behaving improperly, and though he has paid his fare for transportation, and the defendant tells him that he will not carry the horses, and that they must be taken ashore, the plaintiff refuses to take them off the boat, whereupon the defendant puts them ashore, and has them taken to a livery for keeping. The plaintiff goes with the boat, and the next day sends to the livery stable for his horses. In reply the plaintiff is told that he can have his horses by coming and paying the charges for keeping, otherwise they would be sold to pay expenses. They are sold accordingly, and damages as for a conversion are sought of the defendant. The action is not maintainable, since there is nothing to show that the defendant wrongfully deprived the plaintiff, even for a moment, of his property.²

Any asportation of a chattel however *for the use* of a third person amounts to a conversion, for the reason that the act is inconsistent with the right of dominion which the owner (or person entitled to possession) has in it.³ And the same is true of an intentional, or possibly negligent, destruction of the chattel.⁴

¹ *Hiort v. Bott*, L. R. 9 Ex. 86, 89, Bramwell, B.

² *Foulds v. Willoughby*, 8 M. & W. 540. For other examples see *Simmons v. Lillystone*, 8 Ex. 431; *Thorogood v. Robinson*, 6 Q. B. 769.

³ *Fouldes v. Willoughby*, *supra*.

⁴ *Id.*

In the case of acts of co-owners (cotenants) it is held by many authorities that nothing short of a substantial destruction of the common property by the wrongful act of one Cotenancy. of them can make him liable to the other or others for conversion.¹ This is on the ground that each of the common owners has a right to the entire possession and use of the property. A sale and delivery, though absolute, would not be enough; for the purchaser would only become a co-owner with the others.² By many other authorities it is held that a sale and delivery of the property, absolutely, would suffice.³ Some authorities even treat the mere withholding of the chattel by a cotenant from his fellow, or the misuse of it, or the refusal to sever and terminate the cotenancy, as a conversion.⁴ But it is not necessary by any of the authorities that there should be a physical destruction of the property, as by breaking it in pieces; it is enough that the common interest, or rather the plaintiff's interest, is practically destroyed, as by a sale by the cotenant and the buyer's taking the property into another State, there to be kept,⁵ or by refusing division of a divisible mass, such as a quantity of grain in a warehouse.⁶

If an act, in and of itself a conversion, has been committed, the injured party is entitled to bring suit without first

¹ *Camp v. Casey*, 110 Ga. 262; *Winner v. Penniman*, 35 Md. 163; *Farrar v. Beswick*, 1 M. & W. 682, 688; *Parke, B. v. Morgan v. Marquis*, 9 Ex. 145; *Mayhew v. Herrick*, 7 C. B. 229; *Oviatt v. Sage*, 7 Conn. 95; *Barton v. Burton*, 27 Vt. 93; *Pitt v. Petway*, 12 Ired. 69. Compare the case of trespass, ante, pp. 373-375.

² *Morgan v. Marquis*, supra, *Parke, B.*

³ *Weld v. Oliver*, 21 Pick. 559; *Wilson v. Read*, 3 Johns. 175; *Dyckman v. Valiente*, 42 N. Y. 549; *White v. Brooks*, 43 N. H. 402; *Dain v. Coning*, 22 Maine, 347; *Arthur v. Gayle*, 38 Ala. 559; *Williams v. Chadboune*, 6 Cal. 559.

⁴ *Agnew v. Johnson*, 17 Penn. St. 373; *Fiquet v. Allison*, 12 Mich. 328. See *Strickland v. Parker*, 54 Maine, 263.

⁵ *Pitt v. Petway*, 12 Ired. 69.

⁶ *Gates v. Bowers*, 169 N. Y. 14; *German Nat. Bank v. Meadowcroft*, 95 Ill. 124.

demanding his property. In other cases a demand and wrongful refusal will be necessary, since without them there has been no wrongful exercise of dominion.¹ For example: The defendant collusively purchases goods from a trader on the eve of the trader's bankruptcy, and takes the property into his own possession. The assignee of the trader brings trover without a demand. The action is not maintainable, since the defendant had been guilty of no conversion; the trader being competent to contract, though his contract of sale was liable to impeachment.²

Of the last example it should be observed that (in accordance with a principle already stated) the fraud of the trader and the defendant did not make the sale void; its only effect was to render it voidable. The contract was therefore binding until disaffirmed; and a disaffirmance could be made only by a demand of the goods, or by some act tantamount thereto. And the demand and refusal, that is, the conversion, must be apart from the bringing of suit, when such acts are necessary; for the cause of action must have arisen before suit was begun. In the example given, if the defendant had sold the goods, or improperly detained them after a disaffirmance of the sale, the action would have been maintainable.³

Whether a demand is necessary where property has been sold and delivered by one having no authority to sell, has been a point of conflict of authority. The better view however is that the unauthorized sale and delivery are sufficient to constitute a conversion, and hence that demand before suit is not necessary.⁴ It is conceded that if the buyer has *taken* the goods away, there is a conversion by him.⁵

¹ *Durgin v. Gage*, 40 N. H. 302; *Clark v. Hale*, 34 Conn. 398; *Nixon v. Jenkins*, 2 H. Black. 135.

² *Nixon v. Jenkins*, *supra*.

³ *Bloxam v. Hubbard*, 5 East, 407.

⁴ *Galvin v. Bacon*, 2 Fairf. 28; *Parsons v. Webb*, 8 Greenl. 38; *Stanley v. Gaylord*, 1 Cush. 536; *Heckle v. Lurvey*, 101 Mass. 344; *Lovejoy v.*

⁵ *Ely v. Ehle*, 3 Comst. 506; *Nash v. Mosher*, *supra*; *Marshall v. Davis*, *supra*.

A very common instance of the necessity of demand and refusal is where goods have been put into the hands of another for a special purpose, upon agreement to return them when the purpose is accomplished ; in regard to which the rule is, that a breach of the contract by the mere failure so to return the goods does not amount to a conversion. Before the bailee can be liable in trover in such a case, supposing there had been no misappropriation or other act of dominion, there must be a demand for the goods and a refusal to restore them.¹ An unqualified refusal will itself, in almost all cases, constitute a conversion.²

A qualified refusal to deliver goods on lawful demand may however be only *prima facie* evidence of a conversion.³ The defendant may have found the goods, and refused to surrender them to the plaintiff until he shall have proved his right to them. It follows from what has already been said that such a refusal is justifiable, since, if the plaintiff is not entitled to the goods by right, the defendant as finder has the better claim ; and he cannot or may not know that the plaintiff may not be a pretender until he has furnished evidence that he is not. And other cases of the kind might be stated ;⁴ the only question, where the refusal to return is qualified, is whether it is reasonable.⁵

If the demand be not made upon the defendant himself but merely left at his house in his absence, it seems that a

Jones, 30 N. H. 164 ; Woods *v.* Rose, 135 Ala. 297 ; Freeman *v.* Underwood, 66 Maine, 229 ; Bucklin *v.* Beals, 38 Vt. 653 ; Trudo *v.* Anderson, 10 Mich. 357 ; Whitman Mining Co. *v.* Tritle, 4 Nev. 494. Contra, Marshall *v.* Davis, 1 Wend. 109 ; Barrett *v.* Warren, 3 Hill, 348 ; Nash *v.* Mosher, 19 Wend. 431 ; Talmadge *v.* Scudder, 38 Penn. St. 517 ; Sherry *v.* Picken, 10 Ind. 375 ; Justice *v.* Wendell, 14 B. Mon. 12 ; Plano Manuf. Co. *v.* Pacific Elevator Co., 51 Minn. 167.

¹ Severin *v.* Keppell, 4 Esp. 156.

² Alexander *v.* Southey, 5 B. & Ald. 247, 250.

³ Burroughes *v.* Bayne, 5 H. & N. 296 ; Alexander *v.* Southey, *supra*.

⁴ See Pollock, *Torts*, 306, 307, 2d ed.

⁵ Alexander *v.* Southey, 5 B. & Ald. at p. 250.

reasonable time and opportunity to restore the goods should be suffered to elapse before the defendant's non-compliance with the demand can be treated as a refusal amounting to a conversion. Non-compliance with the demand after a reasonable opportunity has been afforded to obey it is however clearly tantamount to a refusal, and is *prima facie* evidence of a conversion, thus requiring the defendant to explain that the omission to deliver the goods was justifiable.¹

¹ Chitty, Pleading, i. 160 ; Thompson *v.* Rose, 16 Conn. 71 ; White *v* Demary, 2 N. H. 546.

CHAPTER XIV.

INFRINGEMENT OF PATENTS, TRADE MARKS, AND COPYRIGHTS.

Statement of the duty. A owes to B the duty (1) not to make, use, or vend, without B's license, a thing patented by B; (2); not, without B's license, to print, publish, or import any copyrighted book of which B owns the copyright, or, knowing the same to be so printed, published, or imported, to sell or expose for sale any copy of such book; and not to violate the rights of B in respect of any other copyrighted matter of which B owns the copyright.¹

§ 1. PATENTS: WHAT MUST BE PROVED, ETC.

The Revised Statutes of the United States grant to patentees, their heirs and assigns, for the term of seventeen years, the exclusive right to make, use, and vend the patented article throughout the United States and the territories thereof;² and they allow (besides bills in equity for equitable protection) recovery of damages in an action on the case in the name of the party interested, either as patentee, assignee, or grantee,³ on proof that the defendant has made, used, or sold the patented article without license of such present owner of the patent.⁴

¹ It would make the statement of this duty far too prolix to specify all of the rights and duties arising under this last clause.

² U. S. Rev. Sts. § 4884.

³ Ib. § 4919.

⁴ See post, p. 417.

That for which the laws give patents is ‘invention,’ something, that is to say, which is *created* by original thought, not something which is discovered except in the narrower sense of discovery. When therefore the word ‘discovery’ is used of something patented, it must be understood in the sense of ‘invention.’ The laws of nature may be discovered by man, but they cannot be invented by him; hence discovery of them cannot be patented.¹ ‘Principle’ or ‘scientific principle’ is often used in this sense of a law of nature, and in *that* sense falls without the patent laws.

Invention may cover processes however in which any of the laws of nature are called into use; but it is the process (or ‘principle’ or ‘discovery’ in that sense) that is patentable, not the law of nature, though that law may never have been known before. And then with regard to processes, it is not processes generally that may be patented. A merely mechanical process, or rather the effect produced by such a process, cannot be patented; or as the law has been laid down from the bench, a man cannot have a patent for the function of a machine,² for that would be to prevent the use of better machines for performing the same function or attaining the same result.³ The processes necessary for making the machine may be patented, not the effect or result to be produced (except with reference to patents for designs). In a word, those processes are patentable which look to results which are to be produced otherwise than by any particular machine or by means not purely mechanical.⁴

Anything to be the subject of a valid patent must, besides being the subject of invention, be new and useful.⁵

¹ Telephone Cases, 126 U. S. 531; O'Reilly *v.* Morse, 15 How. 112; Walker, Patents, § 2, 2d ed.

² Corning *v.* Burden, 15 How. 252, 268.

³ Id.

⁴ Walker, § 6; Mowry *v.* Whitney, 14 Wall. 620; Tilghman *v.* Proctor, 102 U. S. 707; Telephone Cases, 126 U. S. 531.

⁵ Fermentation Co. *v.* Maus, 122 U. S. 413, 427; Telephone Cases, 126 U. S. 533.

Having the foregoing considerations in mind, the specific subjects of patent, by the laws of the United States, are the Subjects of following: arts, machines, manufactures, compositions of matter, and designs.¹ These terms are not intended to be used with perfect exactness, and yet within certain limits they are intended to be in a general way exclusive of each other; a patent would however be good, generally speaking, if it fell under any one of the subjects named, though it might have been improperly assigned in the letters-patent to a particular subject. But notwithstanding their inexactness, the terms have legal limits, and things which do not fall within the legal meaning of any of them cannot be covered by patents. Thus the word 'manufacture' has in the American law of patents a narrow and technical meaning; it appears to be limited to such things as are made by the hand of man, not embraced within the legal meaning of arts, machines, compositions of matter, or designs.²

Attention will now be turned to infringement. This must consist in the wrongful making, using, or vending the patented thing. Infringement: But the statutes leave it to the variation. courts to determine what constitutes a making, using, or vending.

Generally speaking, an infringement in the making takes place whenever another avails himself of the subject of the invention of the patentee, without such variation as will constitute a new discovery; or an infringement is a copy made after and agreeing with the principle laid down in the specification of the patent.³ When a person has obtained a patent for a new invention or a discovery made by his own ingenuity, it is not permitted any one else, by simply varying in form or in immaterial particulars the nature or subject-matter of such invention or discovery, either to obtain a patent for it himself, or to use it without the leave of the patentee. The ques-

¹ Walker, §§ 2, 20.

² Walker, § 17.

³ Curtis, Patents, § 289; Calloway v. Bleaden, Webs. Pat. Cas. 523.

tion then is, in actions for damages for infringements of this nature, not merely whether, in form or condition such as might be more or less immaterial, that which has been done varies from the specification, but whether in reality, in substance, and in effect, the party has availed himself of the patentee's invention, in order to make the thing in question.¹

It matters not therefore that the person complained of had succeeded in obtaining a patent for his supposed invention or discovery ; if it be in substance and effect a copy of the plaintiff's specification and patent, he will be guilty of a breach of duty to the latter by the making, using, or vending of the subject of it, assuming of course that the plaintiff's patent is valid.

With regard to machines, it is often a point of difficulty to decide whether a patent is infringed, since the same elements and the same powers must be employed in all ^{Patents of} machinery. The criterion of liability is however easily stated ; it is whether the machine complained of operates upon the same 'principle' with the one patented. The material question must therefore be, not whether the same elements of motion or the same component parts are used, but whether the given effect is produced substantially by the same mode of operation, and the same combination of powers in both machines. Mere colorable differences or slight improvements cannot affect the right of the original inventor.²

It follows that the question of infringement in such cases does not necessarily depend upon the consideration whether the mechanical structure of the machines is alike.³ ^{Mechanical structure.} Whatever be the mechanical structure, the ques-

¹ *Walton v. Potter*, Webs. Pat. Cas. 585, Tindal, C. J.; *O'Reilly v. Morse*, 15 How. 62, 123; *McCormick v. Talcott*, 20 How. 402, 405; *Morley Machine Co. v. Lancaster*, 129 U. S. 263, 273.

² *Odiorne v. Winkley*, 2 Gal. 51; *McCormick v. Seymour*, 2 Blatchf. 240; *Blanchard v. Beers*, id. 418.

³ *O'Reilly v. Morse*, 15 How. 62, 123; *Morey v. Lockwood*, 8 Wall. 230; *Ives v. Hamilton*, 92 U. S. 426, 431.

tion is, whether the later machine contains the means or combination found in the previous one; in a word, whether the new idea is embodied in the machine complained of. If the plaintiff's combination be found substantially incorporated into the defendant's machine, then the latter's mechanical construction, whatever it may be, is in law but an equivalent for the mechanical construction of the plaintiff's machine. No man is allowed to appropriate the benefit of the new ideas which another has originated and put to use, because he may have been enabled, by superior mechanical skill, to embody them in a different form. In appropriating the idea, he may have appropriated all that is valuable in the new machine.¹

The mere fact that the machine alleged to be an infringement does its work better, or turns out more work in the same time, than the patented article, does not show that there is no infringement. This superiority might be due merely to superior construction upon the same principle with that of the patented machine. On the other hand the fact that the defendant's machine is inferior to that of the plaintiff does not show that it is not an infringement.² Either result is only to be considered in its bearing upon the question whether the principle of the machine complained of is actually and substantially different from that of the plaintiff.³ Of course, if the greater or lesser efficiency be produced by reason of the use of means which are different in substance from those employed in the patented machine, and are not their mechanical equivalent, there is no infringement.⁴

An infringement is also committed, though, besides being equivalent to the thing patented, the later machine accom-

¹ *Blanchard v. Beers*, *supra*.

² *Waterbury Brass Co. v. Miller*, 9 Blatchf. 77; *Chicago Fruit House Co. v. Busch*, 2 Biss. 472.

³ *Id.*; *Gray v. James*, Peters, C. C. 394; *Pitts v. Wemple*, 1 Biss. 87; *Carter v. Baker*, 1 Sawy. 512; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 137; *Morley Machine Co. v. Lancaster*, 129 U. S. 263.

⁴ Cases just cited.

plishes some other advantages beyond that effected by the patent machine. The new machine is still an infringement, so far as it covers the object of the patent. For example: The defendant, for the purpose of giving signals by telegraph, uses the earth for effecting a return circuit; the plaintiffs having a patent for giving signals by means of electric currents transmitted through *metallic currents*. The machinery, aside from the return circuit, used by the defendant is the same as that covered by the plaintiff's patent, and is used without license. The defendant is liable, though the use of the earth for effecting a return circuit is an improvement in the art of telegraphing.¹

Where however the means employed in the later machine are different, not merely in form, but in substance, and consist in combinations differing in substance, there is no infringement, though the object be to produce the same result. For example: The defendant constructs a machine for obtaining a current of air between the grinding surfaces of mill-stones, by means of a rotating vane, for effecting which the plaintiff also has a machine, protected by patent. The plan of the defendant is to remove from the centre of both stones a large circular portion, and in this space, opposite the opening between the two stones, to place a fan, by the rapid rotation of which a centrifugal motion is given to the air, driving it between the stones. The plan of the plaintiff consists of a portable ventilating machine, blowing by a screw vane, which causes a current of air parallel to the axis of the vane, being attached externally to the eye of the upper mill-stone; and the screw vane being thus set in rapid motion, the air is forced through the eye into the centre of the stones, and so finds its way out again. The defendant's machine is not an infringement upon the plaintiff's.²

To substitute in place of some one element in a composition of patented matter a mere known equivalent is an infringe-

¹ Electric Tel. Co. v. Brett, 10 C. B. 838.

² Bovill v. Pimm, 11 Ex. 718.

ment, because, though the patentee may not have expressly mentioned such equivalent in his claim, he is understood to have included it, and in contemplation of law he has included it. However, if he should confine himself to the specific equivalents mentioned in his claim for the patent, by excluding all others, the case would be different, and there would be no infringement in the use of any of such other equivalents.¹

With regard to patents for designs, the patent laws are intended to give encouragement to the decorative arts. They

Patents for design: resemblance. contemplate not so much practical utility as appearance. It is the appearance itself which makes the article salable, and the mode in which these appearances are produced has little, if anything, to do with giving increased salability to the article. The appearance then furnishes the test of identity of design.² Mere difference of lines in the drawing or sketch, a greater or less number of lines, or slight variances in configuration, if insufficient to change the effect upon the eye of the ordinary observer, will not destroy the substantial identity. An engraving which has many lines may present to the ordinary eye the same picture, and to the mind the same idea, as another with fewer lines. If then there be identity of design (not to an expert, but) to the ordinary observer, there is an infringement upon the patented design. For example: The defendant vends a carpet containing figures of flowers arranged in wreaths different in fact, upon close observation, from the plaintiff's patented design for wreaths of flowers upon carpets; the flowers on the defendant's carpet being fewer in number than those on the plaintiff's, and the wreaths being placed at somewhat wider distances. But this difference would not be detected except upon a close comparison. The defendant is liable to the plaintiff in damages.³

¹ *Byam v. Farr*, 1 *Curtis*, C. C. 260; *Woodward v. Morison*, *Holmes*, 124, 131; *Tyler v. Boston*, 7 *Wall.* 327.

² *Gorham Co. v. White*, 14 *Wall.* 511, 528.

³ *Id.* 511.

Under the statute the mere making, except for experiment, without the sale or use of the articles or object patented, is an infringement of the rights of the patentee; and it follows that such an act may be treated as a ground of liability, though no damage be sustained by the patentee. He will be entitled to recover nominal damages at least;¹ and perhaps substantial damages should the act be repeated.² It is equally a ground of liability to use an article which is an infringement of a patent, though the party using it did not make it; and the same is true of the sale of such an article. Each of these acts is an invasion of the patentee's right, and the party doing the act is liable, however innocent of any intention to injure the true patentee, or even of knowledge of the existence of the patent.³

Any one may, without license, make a patented article for mere experiment, or for the purpose of ascertaining the sufficiency of the thing to produce the effects claimed for it, or perhaps when it is made for mere amusement, or as a model.⁴ But it must not be exposed for sale, nor must it have been made for the purpose of pecuniary profit, though experiment was also part of the purpose.⁵

The unauthorized sale of a patented machine, to constitute an infringement, must be a sale, not of the materials of a machine, either separate or combined, but of a complete machine, with the right, expressed or implied, of using the same in the manner secured by the patent. It must be a tortious sale, it has been said, not for the purpose merely of depriving the owner of the materials,

Unauthorized
sale of mate-
rials.

¹ *Whittemore v. Cutter*, 1 Gal. 429.

² Compare the rule in trespass to land, *ante*, p. 236.

³ *Parker v. Haworth*, 4 McLean, 370, 373; *Bate Refrigerator Co. v. Gillett*, 31 Fed. Rep. 809, 815.

⁴ *Beedle v. Bennett*, 122 U. S. 71, 77; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 134; *Frearson v. Loe*, 9 Ch. D. 48. See *Whittemore v. Cutter*, 1 Gal. 429; *Sawin v. Guild*, *id.* 485; *Jones v. Pearce*, Webs. Pat. Cas. 125.

⁵ *Smith Manuf. Co. v. Sprague*, 123 U. S. 249, 256.

but of the use and benefit of his patent,—a point however of some doubt, as has already been observed. The sale of the materials merely cannot, it is clear, amount to an infringement. For example: The defendant, a deputy sheriff, having an execution against the plaintiffs, levies upon and sells the materials of three patented machines, of which the plaintiffs are owners, the materials being at the time complete and fit for operation as machines. The purchaser has not put any of the machines into operation; nor is the sale made with intent that he should do so. This is not a breach of duty to the plaintiffs.¹

The sale or use of the product of a patented machine is no violation of the exclusive right to use, construct, or sell the machine itself; and the patent for a discovery of a new and improved process, by which any product or manufacture before known in commerce may be made in a better and cheaper manner, grants nothing but the exclusive right to use the process. Where a known manufacture or product is in the market, purchasers are not bound to inquire whether it was made on a patented machine or by a patented process.² But if the patentee be the inventor or discoverer of a new manufacture or composition of matter not known or used by others before his discovery or invention, his franchise or right to use and vend to others to be used is the new composition or substance itself. The product and the process, in such a case, constitute one discovery, the exclusive right to make, use, or vend which is secured to the patentee. For example: The defendants, a railroad company, use, without license of the plaintiff, a certain article called vulcanized India-rubber in their car-springs, for the manufacture of which substance the plaintiff has a valid patent; his specification, though describing primarily a process, still showing that the purpose and merit of the process were the production of a valuable fabric. The plaintiff has a patent in the article

¹ *Sawin v. Guild*, 1 Gal. 485.

² See ante, p. 411.

itself, and the act of the defendants is a breach of duty to him.¹

Finally, the Revised Statutes of the United States provide that every person who, in any manner, marks upon any thing made, used, or sold by him for which he has not obtained a patent, the name or any imitation of the name of any person who has obtained a patent therefor, without the consent of such patentee, or his assigns or legal representatives; or who, in any manner, marks upon or affixes to any such patented article the word 'patent' or 'patentee,' or the words 'letters patent,' or any word of like import, with intent to imitate or counterfeit the mark or device of the patentee, without having the license or consent of such patentee or his assigns or legal representatives; or who, in any manner, marks upon or affixes to any unpatented article the word 'patent,' or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable for every such offence, to a penalty of not less than one hundred dollars, with costs; one-half of said penalty to the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offence may have been committed.²

§ 2. TRADE MARKS.

The law relating to trade marks has been changing its point of view, if not its grounds, in recent times, and becoming, as has been observed in another place,³ assimilated to the law of property. The old mode of suing for deceit is falling into disuse as a remedy for infringing a trade mark, in the light of the better remedy afforded by equitable proceedings. But it is not likely that

Change of
ground: in-
junction.

¹ Goodyear *v.* Railroad, 2 Wall. C. C. 356.

² Rev. Sts. § 4901.

³ *Ante*, p. 103, note.

the law will advance to the point of assimilating the law of trade marks so far with the law of property (as e. g. the law of patents) as to make it safe to say that, for the purpose of recovering damages, the old authorities, which make the action virtually an action for deceit, are obsolete.¹

The subject, with this suggestion, must then be dropped in this connection; for while an ample remedy is provided upon the footing of a property right in the trade mark where damages are not sought, the subject lies outside of a treatise relating to actions for damages.² In a word, an injunction, or nominal damages, may be had in respect of the infringement of a trade mark right, without further requirement; but it is not clear whether substantial damages can be obtained without proof of fraud as interpreted by the courts in the law of deceit.

§ 3. COPYRIGHTS: WHAT MUST BE PROVED, ETC.

The Revised Statutes of the United States grant to any citizen of the United States or resident therein, who shall be ^{What may be copyrighted.} the author,³ inventor, designer, or proprietor of any book,⁴ map, chart, dramatic or musical composition, engraving, cut, print, or photograph,⁵ or negative thereof, or of a painting,⁶ drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person, who complies with certain preliminary re-

¹ See *Reddaway v. Bentham Hemp-Spinning Co.*, 1892, 2 Q. B. 639, 644, 646.

² See *Cooley*, Torts, 423-430, 2d ed. The authority of Congress over trade marks is limited. *Trade Mark Cases*, 100 U. S. 82.

³ One may be an 'author' of a verbatim report of another's public lectures. *Walter v. Lane*, 1900, A. C. 539. As to class-room lectures see *Caird v. Sime*, 12 App. Cas. 326, *infra*, p. 421, note 5.

⁴ A newspaper is a 'book.' *Walter v. Lane*, *supra*.

⁵ See *Burrow Lithographic Co. v. Sarony*, 111 U. S. 53, showing that the photograph should represent an original conception.

⁶ *Parton v. Prang*, 3 Cliff. 537.

quirements,¹ the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the case of a dramatic composition, of publicly performing or representing it,² or causing it to be performed or represented by others; and to authors the privilege of reserving the right to dramatize or to translate their own works.³ Proof of ownership of the copyright and the sale or other act protected, without license, of articles covered by it, will make a *prima facie* case.

The copyright is to be good for twenty-eight years, with the right of renewal for fourteen years more.⁴ And any person who without consent of the owner of the copyright, obtained in writing signed by two or more witnesses, shall print, publish, or import any book, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof, and be liable in damages for the act.⁵

To the author of copyrighted matter thus belongs the exclusive right to take all the profits of publication which the sale of the copyrighted matter may produce. And the author's exclusive right extends to the whole copy, and, in a sense, to every part of it. It follows that an infringement of a man's copyright may be committed (1) by reprinting the whole copy, verbatim; (2) by reprinting, verbatim, a part of it; (3) by imitating the whole or a part, or by reproducing the whole or a part with colorable

What copy-right covers:
infringement.

¹ These have always proved a pitfall.

² See *The Iolanthe Case*, 15 Fed. Rep. 439; *The Mikado Case*, 25 Fed. Rep. 183; *Tompkins v. Halleck*, 133 Mass. 32 (on hearing and committing to memory a play, then writing it out and presenting it; this was held an infringement, overruling *Keene v. Kimball*, 16 Gray, 545).

³ Rev. Sts. § 4952.

⁴ Rev. Sts. §§ 4953, 4954.

⁵ Rev. Sts. § 4964. The author has property at common law in his manuscript. *Wheaton v. Peters*, 8 Peters, 591, 657. (As to letters, see *Perceval v. Phipps*, 2 Ves. & B. 19.) But *copyright* is a matter of statute purely. *Id.*; *Albert v. Strange*, 1 Macn. & G. 25. The author of classroom lectures will be protected at common law against unauthorized publication. *Caird v. Sime*, 12 App. Cas. 326. See *Walter v. Lane*, 1900, A. C. 539, 547.

alterations or disguises, intended to give to it the character of a new work; (4) by reproducing the whole or a part under a colorable abridgment, not fairly constituting a new work.

With regard to these forms of infringement, it is to be observed that the defendant's intention does not enter into the determination of the question of piracy.¹ The Intention. question is one of property, analogous to cases of trespass or conversion; the exclusive privilege which the law secures to authors may be equally violated whether the work complained of has been published with or without the *animus furandi*. The fact that a party has honestly mistaken the extent of his right to avail himself of the works of others will not excuse him from liability.²

Piracies of the nature of those mentioned under the first head are seldom committed, and they may be dismissed with the observation that it matters not how much original and valuable matter may be incorporated with the reprint of the copyrighted matter. The act is still an infringement, though the public might derive great benefit from the superior value of the work.

Piracies of the second class are more difficult to deal with. The quantity of matter cannot be a true criterion of the commission of an infringement,³ since only a small portion of a work may be pirated, and this the most important part of the work, or a very important part of it. For example: The defendant makes use, in a published volume of judicial decisions, of the head-notes, or marginal notes, of the plaintiff in a series of volumes of reports, of which the plaintiff owns the copyright. This is an infringement of the plaintiff's rights, for which the defendant is liable; though such notes constitute but a small part of the plaintiff's work.⁴

¹ Clement v. Maddick, 1 Giff. 98. ² Emerson v. Davies, 3 Story, 768.

³ Bramwell v. Halcomb, 3 Mylne & C. 737; Bradbury v. Hotten, L. R. 8 Ex. 1.

⁴ See Wheaton v. Peters, 8 Peters, 591; Saunders v. Smith, 3 Mylne

It may be doubtful if any part of the work of another may be taken *animo furandi*.¹ How much may be honestly taken, that is, taken without any purpose of supplanting the copyright work, is the difficult question. *Animo furandi.* It is clear that, if so much be taken as to diminish sensibly the value of the original, an infringement has been committed.² It is not only quantity, but value also, that must be taken into consideration.³

In deciding questions of this sort, it has been observed that the nature and objects of the selections made must be taken into account, the quantity and value of the materials used, and the extent to which the use may prejudice the sale or diminish the profits, or supersede the objects of the original work.⁴ Many mixed ingredients enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused into another work, so as to be distinguishable in the mass of the latter; but yet the latter, having a distinct purpose from the copyrighted book, may not be an infringement. In other cases the same materials may be used as a distinct feature of excellence, and constitute the chief value of the new work, and then the latter will be an infringement.⁵ Be the quantity then large or small, if the part extracted furnish a substitute for the work from which it is taken, so as to work an appreciable injury, there is an actionable violation of copyright.⁶

Nature and
objects of
selection.

A person is entitled to make a reasonable amount of quotation from a copyrighted production by way of review or

& C. 711; *Sweet v. Sweet*, 1 Jur. 212; *Sweet v. Benning*, 16 C. B. 459.

¹ Mr. Godson thinks it cannot. *Patents and Copyrights*, 216. Mr. Curtis, contra. *Copyrights*, 251, note.

² *Bramwell v. Halcomb*, 3 Mylne & C. 737; *Saunders v. Smith*, id. 711.

³ *Id.*

⁴ *Folsom v. Marsh*, 2 Story, 100.

⁵ *Id.*

⁶ *Curtis, Copyright*, 245; *Folsom v. Marsh*, 2 Story, 100.

criticism ; but, under the pretence of review, no one has the right to publish a material part of the author's work ;¹ that reasonable quotation. is, such a part as might have a sensible effect in superseding the original,² — not perhaps as a whole, but *quoad hoc*.³

In regard to imitations of the whole or part of a copyrighted work, the difficulty of determining the question of piracy is scarcely less. There may be likeness without *imitations*. copying ; and, though the copyrighted work may have suggested the new one, the imitation may not be close enough to amount to infringement. The question however is, whether the variation be substantial or merely colorable.⁴ For example : The defendant is alleged to have infringed the plaintiff's copyright in an Arithmetic by imitating its plan and contents. The test of the defendant's liability is whether he has in fact used the plan, arrangements, and illustrations of the plaintiff as the model of his own work, with colorable alterations and variations, only to disguise the use thereof, or whether the defendant's work is the result of his own labor, skill, and use of common materials and common sources of knowledge, open to all men, the resemblances being accidental, or arising from the nature of the work ; — whether, in short the defendant's work be *quoad hoc* a servile or evasive imitation of the plaintiff's work, or a bona fide original composition from other common or original sources.⁵

In cases of this kind it is not enough to establish a violation of duty that some parts or pages of the later work bear resemblances in methods, details, and illustrations to the copyrighted work. It must further appear that the resemblances in those parts or pages are so close, so full, so uniform, and so striking, as fairly to lead to the conclusion that the

¹ See *Wilkins v. Aiken*, 17 Ves. 422, 424.

² *Roworth v. Wilkes*, 1 Campb. 94. ³ *Curtis*, 246, note.

⁴ *Trusler v. Murray*, 1 East, 363, note; *Emerson v. Davies*, 3 Story, 768, 793.

⁵ *Emerson v. Davies*, supra.

one is a substantial copy of the other, or is mainly borrowed from it.¹

It is to be observed therefore that it does not follow that because the same sources of information are open to all persons, and by the exercise of their own skill, talent, or industry they could, from all of these sources, have produced a similar work, one party may, at second hand, without any exercise of skill, talent, or industry, borrow from another all the materials which have been accumulated and combined by him. For example: The defendant copies a map of a town from the plaintiff's copyrighted map, the latter being made by actual surveys of the region. This is an infringement of the plaintiff's copyright, though the means used by the plaintiff for making his map were open to all persons alike.²

Common
sources of in-
formation.

The next case is that of abridgments; the rule of law in England as to which is said to be, that a fair abridgment, when the understanding is employed in retrenching unnecessary circumstances, is not a piracy of the original work. Such an abridgment is allowable as constituting a new work.³

Abridgments.

It is not clear what the American law upon this point is. It is certain however that to justify an abridgment of a copyrighted work, the case must be one of a bona fide character, and not a mere evasive reproduction of the original, by the omission of some unimportant parts. It is also a matter for consideration whether the new work will prejudice or supersede the old, whether it will be adapted to the same class of readers, and often other things of the same sort must be weighed. In many cases, the question may turn upon a consideration not so much of the quantity used as of the value of the selected materials,⁴ as has been observed in another connection.

¹ *Emerson v. Davies*, *supra*.

² See *Gray v. Russell*, 1 Story, 11, 18.

³ *Copinger, Copyrights*, 101.

⁴ *Gray v. Russell*, 1 Story, 19.

The true question in cases of this kind indeed appears to be whether there has been a legitimate use of the copyright publication, in the fair exercise of the mind, deserving the name of a new work. If there has been, though it may be prejudicial to the original author, it is not deemed to be an invasion of his rights. If there has not been, then it is treated as a mere colorable curtailment of the original work, and an evasion of the copyright.¹

Digests of larger works fall under the head of abridgments. Such publications are in their nature original. The compiler *Digests.* intends to make a new use of them not intended by the original author. But such works must be real digests, and not mere colorable reproductions of the original, in whole or in an essential part. The work bestowed upon a digest must be something more than the labor of the pen and the arrangement of extracts ; it must be mental labor, designed to produce a new work, the object of which must clearly appear to be consistent with the rights of the author of the original work.²

It is not an infringement of a copyright, by the American law, to translate, without license of the author, a copyrighted *Translations.* work into a foreign language ;³ unless the author has reserved the right of translation. And this is true in America, though the author has himself procured and copyrighted a translation of his work into the same language with the translation complained of. For example : The defendant translates into German a book entitled ‘Uncle Tom’s Cabin,’ and publishes his translation here ; the plaintiff, the author, having previously procured her work to be translated into that language, and having procured a copyright upon

¹ 2 Story, Equity, § 939. See also *Story v. Holcombe*, 4 McLean, 306.

² See the remarks of Lord Lyndhurst in *D’Almaine v. Boosey*, 1 Younge & C. 288, a case of infringement of a copyrighted musical composition.

³ *Stowe v. Thomas*, 2 Wall. C. C. 547.

her translation. The defendant has violated no duty to the plaintiff.¹

Finally, the Revised Statutes of the United States provide that every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury.²

Printing manuscript without authority.

¹ Stowe *v.* Thomas, *supra*. See Shook *v.* Rankin, 6 Biss. 477.

² U. S. Rev. Sts. § 4967. See Perceval *v.* Phipps, 2 Ves. & B. 19; s. c. 13 Rev. R. 1, and Preface to last-named; injunction to restrain publication of letters.

CHAPTER XV.

VIOLATION OF RIGHTS OF SUPPORT.

Statement of the duty. A owes to B the duty (1) not to remove, to B's damage, the lateral support of B's land, while it lies in its natural condition, or while, under title by grant or prescription, it lies in an artificial condition ; (2) not to remove negligently, to B's damage, the lateral support of B's land with the superincumbent weight of buildings or materials thereon, adjacent to the boundary ; (3) not to withdraw, to B's damage, the subjacent support of his premises.

§ 1. LATERAL SUPPORT: WHAT MUST BE PROVED, ETC.

The owner of land has a right, against his neighbor, to what is termed the lateral support of the land. This right of *Nature of the right.* lateral support is a right of support of the land in its natural condition, or, in case of grant or prescription, in an artificial condition ; and this right of support of land in its natural condition is, *prima facie*, a right analogous to the right to make use of a running stream or of the air. It is not in the nature of an easement, and does not depend upon prescription or grant.¹ But of course a right to remove the support may be acquired by grant,² though not by custom or prescription, because that, it is said, would be oppressive and unreasonable.³

¹ Bonomi *v.* Backhouse, El., B. & E. 622, 646 ; s. c. 9 H. L. Cas. 503. See Darley Colliery Co. *v.* Mitchell, 11 App. Cas. 127 ; Bonaparte *v.* Wiseman, 89 Md. 12, 23 ; Shafter *v.* Wilson, 44 Md. 280.

² Rowbotham *v.* Wilson, 8 H. L. Cas. 348, and Maryland cases as just cited.

³ Hilton *v.* Granville, 5 Q. B. 701 ; Wakefield *v.* Buccleuch, L. R. 4 Eq. 613.

This right of support of the land surrounding a man's premises, unlike rights of property in general, is not infringed, for the purposes of a suit for tort, unless removing the soil cause damage;¹ but damage being caused by the removal of support, a right of action arises. Accordingly, to prove the removal of the lateral support of the plaintiff's land in its natural condition, to the plaintiff's damage, will make a *prima facie* case.² For example: The defendant, owner of premises adjoining the premises of the plaintiff, which are located upon the side of a declivity, excavates the earth of his land so closely^{*} to the boundary between his own and the plaintiff's property as to cause the soil of the plaintiff's premises of its own natural weight, to slide away into the pit. This is a breach of duty to the plaintiff, for which the defendant is liable in damages.³

The doctrine however goes no further than to sustain a right of action for the sinking of land in its natural condition. The action cannot be maintained if the sinking be due to a superincumbent weight placed upon the plaintiff's premises, unless indeed some distinct right has been acquired against the adjoining occupant. For example: The defendant digs a gravel pit in his premises close to the line between his own and the plaintiff's land. Within two feet of the line, on the plaintiff's land, stands a brick house, erected ten years before, and occupied by the plaintiff. By reason of the defendant's excavation, the premises being lo-

¹ Bonomi *v.* Backhouse, *supra*.

² Thurston *v.* Hancock, 12 Mass. 220. See Gilmore *v.* Driscoll, 122 Mass. 199; Bonaparte *v.* Wiseman, 89 Md. 12; Shafter *v.* Wilson, 44 Md. 280. Some doubt was cast upon this doctrine in a dictum in Radcliff *v.* Brooklyn, 4 Comst. 195, 203, on the ground that it might interfere in cities with the use of property. But this dictum has been disregarded. Farrand *v.* Marshall, 21 Barb. 409, 414; McGuire *v.* Grant, 1 Dutch. 356, 367. See Foley *v.* Wyeth, 2 Allen, 131. As to giving notice, in cities, to the adjoining owner see Bonaparte *v.* Wiseman, 89 Md. 12; Shafter *v.* Wilson, 44 Md. 280.

³ Thurston *v.* Hancock, *supra*.

cated on the side of a hill, it becomes necessary for the plaintiff to vacate his house, and to take it down, to prevent it from sliding into the defendant's pit. The defendant is not liable, since the plaintiff had acquired no legal right to the support of his house.¹

A right to lateral support of buildings is in the nature of a right of easement, and in England can be acquired either by

The right an easement, in nature. grant or by prescription.² In this country the right cannot, it seems, be acquired by prescription.

*tion.*³ But even in England, though a building may have stood upon the plaintiff's premises for the period of prescription, if its walls were improperly constructed, so as for this cause to give way, and not by reason of the excavation alone, the plaintiff cannot recover.⁴ And the same would be true, if, within the period of prescription, a new story were added to the house, whereby the pressure was so increased as to cause the sinking.⁵

On the other hand, it is to be observed that the mere fact that there were buildings, recently erected, standing upon the border of the owner's land when it sank, will not prevent his recovering damages. If the soil sank, not on account of the additional weight, but on account of the operations in the adjoining close (though they were carefully conducted), and would have sunk had there been no buildings upon it, it is held in England that the person sustaining the damage is entitled to redress to the extent of his loss.⁶

¹ *Thurston v. Hancock*, *supra*; *Caledonian Ry. Co. v. Sprott*, 2 Macq. 449; *Partridge v. Scott*, 3 M. & W. 220.

² *Dalton v. Angus*, 6 App. Cas. 740, *infra*, p. 431.

³ *Gilmore v. Driscoll*, 122 Mass. 199, 207; *Tunstall v. Christian*, 80 Va. 1. Yet it has been common in this country to speak of the right as arising from grant or prescription. See *Gilmore v. Driscoll*, *supra*, and cases there cited.

⁴ *Richard v. Scott*, 7 Watts, 460; *Dodd v. Holme*, 1 Ad. & E. 493.

⁵ See *Murchie v. Black*, 34 L. J. C. P. 337.

⁶ *Stroyan v. Knowles*, 6 H. & N. 454. But some courts hold that the value of the buildings could not be recovered, unless there was negligence; assuming that no right had been acquired by grant (or by prescription,

Clearly if the operation in the adjoining land was conducted with a negligent disregard to the rights of the plaintiff, and the effect of such negligence was the fall of the plaintiff's building, the adjoining occupant is liable therefor.¹

But in the absence of negligence in the defendant, if the damage to the plaintiff's premises would have been slight and inappreciable had there been no superincumbent weight, he will not be entitled to recover. For example: The defendant digs a well near the plaintiff's land, which causes the same to sink, and a building erected there within twenty years falls. If the building had not been on the plaintiff's land, the land would still have sunk, but the damage to the plaintiff would have been inappreciable. This is no cause of action.²

The result therefore is, (1) that the defendant is liable for the damages suffered by his neighbor from the withdrawal of

Summary. the lateral support when that act, of itself, and without the fault of the neighbor, was the cause of the damage, including in England, but not in this country, damage done to sound buildings built twenty years or more before; though the excavation was carefully made. (2) He is liable for all the damage suffered by withdrawing the support when he was guilty of negligence, including in the damages injuries to soundly built buildings however recently erected. (3) He is not liable, in the absence of grant or prescription, if the subsidence was caused by the weight of buildings, or by the defective condition of the same.

The right of lateral support to contiguous buildings may be acquired by grant or reservation, or in England, but not in this country, by prescription.³ Where buildings have been if a right can so be acquired). *Gilmore v. Driscoll*, 122 Mass. 199, 206, 207.

¹ See *Gilmore v. Driscoll*, *supra*; *Charless v. Rankin*, 22 Mo. 566, 574; *Schrieve v. Stokes*, 8 B. Mon. 453, 459; *Dodd v. Holme*, 1 Ad. & E. 943; *Bibley v. Carter*, 4 H. & N. 153.

² *Smith v. Thackerah*, L. R. 1 C. P. 564.

* *Dalton v. Angus*, *supra*; *Lemaitre v. Davis*, 19 Ch. D. 281. Not

erected in contiguity by the same owner, and therefore require mutual support, there is, either by a presumed grant or by a

Lateral support: how the right may be acquired: mutual support. presumed reservation, a right to such mutual support in favor of the original owner on a sale by him of any of the buildings. As against himself, on the other hand, there is a presumed grant of the right of support in favor of the purchaser, which

right takes effect at once. And the reservation in the original owner, after one sale, of the right of support for the adjoining building, will enable a second purchaser, on buying this adjoining house, to claim against his neighbor the same right of support; since by the purchase he acquires all of his vendor's rights. It follows also that the same mutual dependency continues after subsequent alienations by the purchasers from the original owner, and this regardless of the question of time. For example: The defendant constructs a drain under his house to connect with a public sewer, and thereby weakens the support of the wall separating the defendant's house from the plaintiff's, to the injury of the latter's house. The two houses originally belonged to the same person, who had demised them both for ninety-nine years to W. The latter mortgages both to B, who assigns the mortgage to H, and H conveys (under a power) one of the houses to the plaintiff in July, and the other to the defendant in September following. The defendant's act in weakening the support of the plaintiff's house is a breach of duty, and the defendant is liable.¹

But the right to such support of buildings is not a natural right; and where the adjoining buildings were erected by different owners the right of support can be acquired in favor of either of the original owners (and their successors in estate) only by grant of the other or reservation, or in England by prescription. For example: The defendants pull down a house adjoining the plaintiff's, without shoring up the

by prescription, *Tunstall v. Christian*, 80 Va. 1. See also *Gilmore v. Driscoll*, 122 Mass. 199, 207.

¹ *Richards v. Rose*, 9 Ex. 218.

latter, and thereby cause damage to the plaintiff's property. The houses were built about the same time, but by different owners of the soil ; and there is no title to support either by grant or by prescription, nor has the pulling down been negligently done. The defendants are not liable; at least if the plaintiff has sufficient notice of the purpose of the defendants to enable him to take the proper precautions against the damage.¹

If there be an intervening house or store in the block, between the premises of the plaintiff and those of the defendant, the pulling down of the latter's building cannot be a breach of duty to the former in the absence of some special engagement between the parties, especially if the plaintiff's building was already in an unsafe condition.²

There appears to be no obligation resting upon the owner of a house towards his neighbor in the adjoining tenement to keep his house in repair (further than to prevent the same from becoming a nuisance³) in a lasting and substantial manner. The only duty is deemed to be to keep it in such a state that his neighbor may not be injured by its fall. The house may therefore be in a ruinous condition, provided it be shored up sufficiently, or the house may be demolished altogether, if this can be done without injury to the adjoining house.⁴

If either of the cotenants of a party-wall⁵ should wish to improve his premises before the wall has become ruinous, or incapable of further answering the purposes for which it was built, he may underpin the foundation, sink it deeper, and increase, within the limits of his own land, the thickness, length, or height of the wall, if he can do

¹ *Peyton v. London*, 9 B. & C. 725.

² *Solomon v. Vintners' Co.*, 4 H. & N. 585.

³ Compare *Giles v. Walker*, 24 Q. B. D. 656, as to care of premises on which thistles grow.

⁴ *Chaundler v. Robinson*, 4 Ex. 163, 170.

⁵ For the different kinds of party-walls, see *Watson v. Gray*, 14 Ch. D. 192; *Weston v. Arnold*, L. R. 8 Ch. 1084.

so without injury to the building upon the adjoining close. And to avoid such injury, he may shore up and support the original wall for a reasonable time, in order to excavate and place a new underpinning beneath it; or he may pull the wall down for the purpose of building a new one.¹ To pull the wall down without intending to replace it would be evidence of an ouster, for which an action could be maintained.²

It is held that one of the cotenants cannot, without consent of the other, interfere with the wall unless he can do so without injury to the adjoining building. No degree of care or diligence in the performance of the work will relieve him from liability, if injury be done to the adjoining building by making the improvements. For example: The defendant, co-owner with the plaintiff of a party-wall between their premises, digs down his cellar about eighteen inches, underpinning the party-wall, and lowers the floor of his first story the same distance, doing the work prudently and carefully. In consequence of these operations, the division wall settles several inches, carrying down the plaintiff's floors, and cracking the front and rear walls of his (the plaintiff's) building. The defendant is liable to the plaintiff for the damage thus caused.³

It follows that, if a party-wall rest upon an arch, the legs of which stand within the land of the respective owners, neither can remove one of the legs to the detriment of his neighbor, without his consent.⁴ On the other hand, either may run up the wall to any height, provided no damage be thereby done to the other.⁵

The existence of a right to fix a beam or timber into the wall of a neighbor's house depends upon the situation of

¹ Standard Bank *v.* Stokes, 9 Ch. D. 68.

² Jones *v.* Read, 10 Ir. R. C. L. 315, Ex. Ch.

³ Eno *v.* Del Vecchio, 6 Duer, 17, 27; s. c. 4 Duer, 58.

⁴ Partridge *v.* Gilbert, 15 N. Y. 601; Dowling *v.* Hennings, 20 Md. 179.

⁵ Matts *v.* Hawkins, 5 Taunt. 20; Brooks *v.* Curtis, 50 N. Y. 639, 644. See Dauenhauer *v.* Devine, 51 Texas, 480.

the wall. If it stand wholly upon the land of the owner, it is clear that no such right can exist except by grant or possibly by prescription. Any attempt by the adjoining owner to fix a timber in the wall, without consent given, would be a trespass, for which an action would lie; or probably it could be treated as a nuisance and abated accordingly. And a wall thus situated (the adjoining owner having acquired no right to the enjoyment of it) may be altered or removed at pleasure, provided no damage be done to the adjoining premises.

Fixing beams
into party-
walls.

If however the wall be a party-wall owned in severalty to the centre thereof, or in common, by the adjoining owners, the case will of course be different; and each will be entitled to fix timbers into it, in a prudent manner, doing no damage to the other owner.¹

Where the wall is owned in severalty to the centre, it is clear that neither owner can extend his timbers beyond the centre of the wall. To pass the line of division without permission would be as much a trespass as to make an entry upon the soil without permission.

On the other hand, the case would clearly be different if the wall were owned in common by the adjoining proprietors, since, as has elsewhere been observed,² each of the tenants in common is seised of the whole common property. And it follows that such a wall may also be taken down by either owner, for the purpose of rebuilding, if necessary.³

§ 2. SUBJACENT SUPPORT: WHAT MUST BE PROVED, ETC.

While ordinarily a man's title to land includes the underlying soil to an indefinite extent towards the centre of the earth, it is settled law that there may be two freeholds in the same body of earth measured superficially and perpendicu-

¹ See L. C. Torts, 555.

² *Ante*, p. 373.

³ *Stedman v. Smith*, 8 El. & B. 1.

larly down towards the earth's centre; to wit, a freehold in the surface soil and enough lying beneath it to support it, and a freehold in underlying strata, with a right of access to the same, to work therein and remove the contents.¹

Underground freehold : limited right of excavation. This right in regard to the use of the subjacent strata however, as is above intimated, is not unqualified; on the contrary, it must be exercised, as in removing lateral support, in such a way as not to damage the owner of the surface freehold. What then the plaintiff has to prove in a case of the kind is that, to his damage, his freehold, in its natural condition, has been deprived by the defendant of its necessary support by underground excavation; that being the case, the defendant is liable, however carefully he may have conducted the work in his own freehold. For example: The defendants, a coal-mining company, lessees of a third person of coal-mines underlying the plaintiff's close, upon which there are no buildings, in the careful and usual manner of working the mine so weaken the subjacent support to the plaintiff's close, without his consent, as to cause the same to sink and suffer injury. The defendants are liable for the damage sustained.²

It is laid down that there is a difference between rights of support against a subjacent owner of land and an adjacent owner in regard to buildings upon the dominant tenement. The right to the support of buildings, as has already been observed, depends upon grant, reservation, or in England prescription. But as against an underlying freehold, the owner of the surface freehold is entitled, without grant or reservation, to the support of all buildings erected, however recently, before the title of the lower owner

¹ *Humphries v. Brogden*, 12 Q. B. 739; *Wilkinson v. Proud*, 11 M. & W. 33.

² *Humphries v. Brogden*, supra. See *Popplewell v. Hodkinson*, L. R. 4 Ex. 248; *Jordeson v. Sutton Gas Co.*, 1899, 2 Ch. 217, C. A. See *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127; *Tunnicliffe v. West Leigh Colliery Co.*, 1905, 2 Ch. 390, as to damages—*future* subsidence not to be considered till it happens, the cause of action beginning then.

began and possession was taken. For example: The defendants are lessees and workers of a mine under the plaintiff's freehold. The plaintiff, at various times before the defendants began their works, and within twenty years thereof erects buildings above the mines on ground honeycombed by the workings of another company some years before. The workings by the defendants increase the defective nature of the ground, and a subsidence of the surface follows; and from this cause and the fact that the plaintiff's buildings were not constructed with sufficient solidity, considering the state of the ground, damage results to the plaintiff's buildings. The defendants have violated their duty to the plaintiff by not shoring up and supporting the overlying tenement.¹

The support required, in the absence of grant or prescription, appears however to be merely a reasonable support. Whether the owner of the upper tenement could require the owner or occupant of the lower to support structures of extraordinary weight, is doubtful. The true view seems to be that when the owner of the whole property severs it by a conveyance either of the surface, reserving the mines, or of the mines, reserving the surface, he intends, unless the contrary be made to appear by plain words, that the land shall be supported, not merely in its original condition, but in a condition suitable to any of the ordinary uses necessary or incidental to its reasonable enjoyment.²

There is an analogous right of support in respect to the upper stories of houses divided into horizontal tenements. It is laid down that if a building is divided into floors or 'flats,' separately owned, the owner of each upper floor or

¹ Richards *v.* Jenkins, 18 Law T. N. S. 437. Of course, if the buildings would have fallen without the act of the defendants, they would not be liable for the damage to them.

² Richards *v.* Jenkins, *supra*. In this case however Mr. Barou Channel inclined to think that, if the buildings were erected *after* the defendants took possession, the period of prescription should elapse before a right to their support could be acquired.

**Upper stories
of houses:
vertical sup-
port.** ‘flat’ is entitled to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself.¹ The same would probably be true if the stories of the building were *leased* to different persons.

¹ *Dalton v. Angus*, 6 App. Cas. 740, 793; *Caledonian Ry. Co. v. Sprot*, 2 Macq. 449.

CHAPTER XVI.

VIOLATION OF WATER RIGHTS.

Statement of the duty. A, a riparian proprietor or mill owner, owes to B, a riparian proprietor below, on the same stream, the duty not to take, except for domestic purposes, or for the needs of a mill suited to the size of the stream, anything more than a usufruct of the water thereof.

§ 1. USUFRUCT AND REASONABLE USE OF STREAMS : WHAT MUST BE PROVED, ETC.

Riparian proprietors have rights in the water of the streams flowing by or through their lands, which may be thus stated : Each proprietor is entitled to the enjoyment of the water ex jure naturæ, as a natural incident to the ownership of the land.¹ And the right is like ordinary property rights in this, that an action may be maintained for an infraction though no actual damage has been sustained.² Examples from the authorities just cited will presently appear.

Nature of the
right : usu-
fruct : reason-
able use.

There have been some expressions by the courts, and one or two decisions, to the effect that the right to the use of a running stream is absolute, like the right to the enjoyment of land ; so that any diminution of the water by an upper proprietor is deemed actionable if he has not a right by grant, or by prescription, just as an entry upon land without license is actionable.³ And this view has been urged in England.⁴

¹ Embrey *v.* Owen, 6 Ex. 353, 369, Parke, B.

² Id. ; Sampson *v.* Hoddinott, 1 C. B. n. s. 590.

³ Wheatley *v.* Chrisman, 24 Penn. St. 298. See Crooker *v.* Bragg,
10 Wend. 260.

⁴ See the arguments in Embrey *v.* Owen, 6 Ex. 353.

The true principle however is that each riparian owner has at least a right of usufruct ('*usus-fructus*') in the stream, subject to the rights, whatever they may be, of the riparian owners higher up, but that no one can have an absolute right, for any and every purpose, to the whole volume of water. That is, there can be no infraction of the right by any abstraction of water which does not sensibly affect its volume. Without such an act, the usufruct is not interfered with, and the right of other proprietors has not been infringed.¹ It is only for an unreasonable use that an action will lie.² To make then a *prima facie* case, the lower proprietor has to prove that the upper proprietor has taken an amount of water from the stream such as has sensibly diminished the current; *prima facie* that would be unreasonable, unless the plaintiff made his claim as upon a mill-stream.

What amounts to an unreasonable use of a stream will vary according to the circumstances of the case. To take a quantity of water from a large stream for agriculture or for manufacturing purposes might cause no sensible diminution of the volume; while taking the same quantity from a small brook passing through many farms would be of great and manifest injury to those below who need it for domestic or other use. This would be an unreasonable use of the water, and an action would lie therefor.³

The same would be true if a mode of enjoyment quite different from the ordinary one should be adopted, sensibly diminishing the volume of water for any considerable time.⁴ For example: The defendant, an upper riparian owner, diverts much water from the stream into a reservoir, and delays it

¹ *Embrey v. Owen*, *supra*; *Mason v. Hill*, 2 Nev. & M. 747; s. c. 5 B. & Ad. 1; *Miner v. Gilmour*, 12 Moore, P. C. 131; *Sampson v. Hoddinott*, 1 C. B. n. s. 590.

² *Embrey v. Owen*, *supra*.

³ *Elliot v. Fitchburg R. Co.*, 10 Cush. 191; *Miner v. Gilmour*, 12 Moore, P. C. 131.

⁴ *Sampson v. Hoddinott*, 1 C. B. n. s. 590.

there to supply a factory; this being an extraordinary use of the stream. The act is a breach of duty to the plaintiff, a lower owner.¹ Again: The defendant owns a great tract of porous land adjacent to a stream, the water of which he diverts by canals, in order to irrigate his land, sensibly diminishing the stream. This is a breach of duty to the plaintiff, an owner lower down.²

These examples illustrate the rule that the action does not require proof of special damage.³ A stream may be much reduced in size without causing any actual loss Special damage not necessary. to lower proprietors; but the right being to a full volume of water, the diminution of the stream in any sensible, material degree by the upper proprietor is an infraction of that right, and accordingly creates liability. If, on the other hand, there is no diminution of the stream when it reaches the plaintiff, there is no liability whatever the abstraction. For example: The defendants erect a dam across a stream and take a considerable part of the water; but the amount so taken is made good by other water which the defendants let into the stream, and the plaintiff in fact sustains no damage. There is no infraction of the plaintiff's right, and no cause of action.⁴

Again, every riparian proprietor may use the water of the stream for his natural domestic purposes, including the needs of his animals, and this without regard to the effect it may have, in case of deficiency, upon those lower down.⁵ That is, the right is not limited to the usufruct; the whole may be taken if needed.

Use of stream
for domestic
purposes.

¹ *Wood v. Waud*, 3 Ex. 748, 781.

² *Embrey v. Owen*, 6 Ex. 353, 372.

³ See *Harvard Law Rev.*, Dec. 1899, p. 299.

⁴ *Elliot v. Fitchburg R. Co.*, 10 Cush. 191; *L. C. Torts*, 509. See also *Seeley v. Brush*, 35 Conn. 419; *Chatfield v. Wilson*, 31 Vt. 358; *Gerrish v. New Market Manuf. Co.*, 30 N. H. 478, 483; *Dilling v. Murray*, 6 Ind. 324.

⁵ *Miner v. Gilmour*, 12 Moore, P. C. 131; *Wood v. Waud*, *snpr*; *Evans v. Merriweather*, 3 Scam. 492, 495; *Fleming v. Davis*, 37 Texas, 173, 198; *Baker v. Brown*, 55 Texas, 377.

And this leads to the remark that one criterion of liability for abstracting water from streams, used for milling purposes, probably is whether, considering all the circumstances, the size of the stream and that of the mill-works, there has been a greater use of the stream, in abstracting or detaining the water, than is reasonably necessary and usual in similar establishments for carrying on the mill. A mill-owner is not liable for obstructing and using the water for his mill, if it appear that his dam is of such magnitude only as is adapted to the size and capacity of the stream, and to the quantity of water usually flowing therein, and that his mode of using the water is not unusual or unreasonable, according to the general custom of the country in dams upon similar streams; and this, whatever may be the effect upon the owners of land below.¹

The water of a stream running wholly within a man's land may be diverted, if it be returned to its natural channel before reaching the lower proprietor² and this could perhaps be done where the water runs between the lands of riparian occupants, so far as the rights of parties lower down are concerned. The only person entitled to complain of such an act would be the opposite proprietor.

The foregoing remarks suppose that there exists no right by prescription or grant to the use of the stream by either the upper or lower proprietor. The rights and burdens of the parties may be greatly varied by grant or by prescription.

With regard to surface water running in no defined channel, the rule of law is that every occupant of land has the

¹ *Springfield v. Harris*, 4 Allen, 494; *s. c. L. C. Torts*, 506. See *Davis v. Getchell*, 50 Maine, 602; *Merrifield v. Worcester*, 110 Mass. 216; *Hayes v. Waldron*, 44 N. H. 580; *Pool v. Lewis*, 41 Ga. 162; *Timm v. Bear*, 39 Wis. 254; *Clinton v. Myers*, 46 N. Y. 511. The statutes with regard to mill-streams should however be noticed.

² *Miner v. Gilmour*, *supra*; *Tolle v. Correth*, 31 Texas, 362.

right to appropriate such water, though the result be to prevent the flow of the same into a neighboring stream, or upon the land of an adjoining occupant.¹ Nor can there be any prescriptive right to such water. Appropriating general surface water. For example: The defendant, for agricultural and other useful purposes, digs a drain in his land, the effect of which is to prevent the ordinary rainfall, and the waters of a spring arising upon his land, and flowing in no defined channel, from reaching a brook, upon which the plaintiff has for fifty years had a mill. The defendant is not liable for the diversion, however serious the inconvenience to the plaintiff.²

In the Pacific States the law is peculiar. There he who first duly appropriates all the waters of a stream running in the public lands becomes entitled to the same First appropriation. to the exclusion of all others.³ But if only part is appropriated, another may appropriate the rest; or if all is appropriated only on certain days, others may appropriate it on other days.⁴

§ 2. SUB-SURFACE WATER.

In regard to underground streams, if their course is defined and known, as is the case with streams which sink underground, pursue for a short distance a subterraneous course, and then emerge again, the owner of the land lower down has the same rights as he would have if the stream flowed entirely above ground.⁵ But if the underground water be merely percolation, there can be no breach of duty in cutting it off from a lower or adjoining

Underground streams: mere percolation.

¹ *Broadbent v. Ramsbotham*, 11 Ex. 602; *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Gannon v. Hargadon*, 10 Allen, 106; *Curtis v. Ayrault*, 47 N. Y. 73, 78; *Livingston v. McDonald*, 21 Iowa, 160, 166.

² *Broadbent v. Ramsbotham*, supra; *Rawstron v. Taylor*, 11 Ex. 369.

³ *Smith v. O'Hara*, 43 Cal. 371.

⁴ *Id.* As to what is a due appropriation, see *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *McKinney v. Smith*, 21 Cal. 374.

⁵ *Dickinson v. Grand Junc. Canal Co.*, 7 Ex. 282.

land-owner. And there can be no prescriptive right to the water. For example: The defendant, a land-owner adjoining the plaintiff, digs on his own ground an extensive well for the purpose of supplying water to the inhabitants of a district, many of whom have no title as land-owners to the use of the water. The plaintiff has previously for more than sixty years enjoyed the use of a stream (for milling purposes) which was chiefly supplied by percolating underground water, produced by rainfall; which water now, after the digging of the well, is cut off and fails to reach the stream. The defendant's act is no breach of duty to the plaintiff.¹

¹ *Chasemore v. Richards*, 7 H. L. Cas. 349, overruling *Balston v. Bensted*, 1 Camp. 463. No right to such percolating water can arise by grant or by prescription, apart from the right to the land itself. *Id.* Further see *Chase v. Silverstone*, 62 Maine, 175; *Wilson v. New Bedford*, 108 Mass. 261; *Frazier v. Brown*, 12 Ohio St. 294; *Hanson v. McCue*, 42 Cal. 303. There is a tendency of late to make the right to cut off percolating water depend, as by the Roman law, upon the reasonable use of the soil. *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439; *Katz v. Walkinshaw*, 141 Calif. 116, 70 Pac. Rep. 663; *ante*, p. 23. As to polluting streams, see *post*, p. 450.

On the whole subject of the foregoing chapter see *Gould on Waters*, a valuable work.

CHAPTER XVII.

NUISANCE.

Statement of the duty. A owes to B the duty (1) not to obstruct or impair the use of the public ways or waters in such a manner as to cause damage to B ; (2) not, except in the ordinary, natural use of his own, to flood the land of B with water collected upon his own land, or by changing the course of currents ;¹ (3) not to cause or suffer the existence upon his own premises of anything not naturally there which while there causes damage to B ; (4) not to use his own premises so as to endanger the life or impair the health of B, or to disturb B's comfort, to his damage, in the use of his (A's) premises.

Public nuisances are indictable nuisances, being committed (1) in the public ways or waters, or (2) on private premises to the prejudice of the general public.²

Private nuisances are non-indictable nuisances, being committed on private premises to the prejudice of one person, or but a few persons, of the neighborhood.

A public nuisance may be also a private nuisance.

§ 1. WHAT CONSTITUTES A NUISANCE.

It appears to be of the essence of a nuisance that there should be some duration of mischief ; a wrong producing damage instantaneously, as in the case

Nature of
the wrong.

¹ But see *infra*, p. 303.

² 'If a person erects on his own land anything whatever calculated to interfere with the convenient use of the road, he commits a nuisance.' Stephen, J., in *Brown v. Eastern Ry. Co.*, 23 Q. B. Div. 391, 392, case of a heap of dirt by the roadside. Negligence is not necessary. *Hauck v. Tide Water Co.*, 153 Penn. St. 366; *Rapier v. London Tramways Co.*, 1893, 2 Ch. 588, 600.

of an explosion,¹ could hardly be a nuisance. And then further to determine what constitutes a nuisance, so as to render the author of it liable to a neighbor in damages, a variety of other considerations must often be taken into account; especially where the act in question has been committed in a populous neighborhood, in the prosecution of a manufacturing business. And even if the business itself be unlawful, it does not follow that a private individual can call for redress by way of a civil action for damages. Whether he can do so or not will depend upon the question whether he has sustained special damage, by reason of the thing alleged to be a nuisance.

Even supposing the nuisance not to be a public one, that is, not to affect seriously the rights of the public in general,

Reasonable manner of conducting business: 'convenient place.' much difficulty arises in determining when the business carried on upon neighboring premises, either in itself or in the manner of conducting it, is so detrimental as to subject the proprietor or manager to liability in damages. And this diffi-

culty was until recently increased by certain inexact terms used in the old authorities. It was said that if a business was carried on in a 'reasonable manner,' an action for damages could not be maintained, though annoyance resulted; and the term 'reasonable manner' was explained as meaning that the business was to be carried on merely in a *convenient* place. That is, a trade was not to be treated as a nuisance if carried on in the ordinary manner in a convenient locality. The result was to bestow upon a manufacturer the right to ruin his neighbor's property, provided only his business was carefully conducted in a locality convenient for its management.²

Recent authorities have however changed all this, by declaring that, when no prescriptive right is proved, the true meaning of the term 'convenient,' used by the older authori-

¹ An explosion might be a *consequence* of a nuisance however. See *Kinney v. Gerdes*, 116 Ala. 310; *Rudder v. Gerdes*, id. 332. These cases review the authorities as to *keeping gunpowder in large quantities*.

² *Comyns's Digest*, Action upon the Case for a Nuisance, C; *Hole v. Barlow*, 4 C. B. n. s. 334.

ties, lies in the consideration whether the plaintiff has suffered a visible detriment in his property by reason of the management or nature of the defendant's business; if he has, the defendant is liable. Convenience is a question for the neighbor and not for the manufacturer; and visible damage to the neighbor's property shows that the business is carried on in an inconvenient place.¹

The plaintiff accordingly makes a *prima facie* case against the defendant by showing that the defendant is carrying on a business in the neighborhood of the plaintiff, which has actually and visibly done harm to the plaintiff's property there. For example: The defendants are proprietors of copper-smelting works in the plaintiff's neighborhood, where many other manufacturing works are carried on. The vapors from the defendants' works, when in operation, are visibly injurious to the trees on the plaintiff's estate; the defendants having no prescriptive right to carry on their business as and where they do. The defendants are guilty of a breach of duty to the plaintiff, for which they are liable in damages; though, for the purposes of manufacturing, the business is carried on at a convenient place.²

But a person living in a populous neighborhood must suffer some annoyance; that is part of the price he pays for the privileges which he may enjoy there. He cannot bring an action for every slight detriment to his property which a business in the vicinity may produce. Or, to state the case in the language of judicial authority, if a man live in a town, he must submit to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a

¹ *Bamford v. Turnley*, 3 Best & S. 62, 66; *Cavey v. Ledbitter*, 13 C. B. n. s. 470; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642.

² *St. Helen's Smelting Co. v. Tipping*, supra. See also *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436; s. c. 7 H. L. Cas. 600.

man live in a street where there are numerous shops, and a shop be opened next door to him, which is carried on in a fair and reasonable way, he has no ground of complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that occupation is a visible injury to property, the case is different.¹

It should be observed in this connection that the plaintiff is not precluded from recovering by reason of the fact that he ^{Notice of works.} had notice of the existence of the nuisance when he located himself near it. If the thing complained of be unlawful—if there be no prescriptive right to do it—the doer cannot set up notice to escape liability.² For example: The defendant is a tallow-chandler, carrying on his business in a certain messuage, in such a manner as to convey and diffuse noxious vapors and smells over premises adjoining, which the plaintiff takes possession of while the defendant is carrying on his business. The defendant is liable.³

Subject to any annoyance which may result from the right which every land-owner has to the ordinary and natural use of ^{Turning water back.} his premises, it is held by high authorities that no one may turn water from his own land back upon that of his neighbor without having acquired a right so to do by statute or by grant or prescription;⁴ and this though the water thrown back comes of natural rainfall.⁵ Such an act

¹ Lord Westbury in *St. Helen's Smelting Co. v. Tipping*.

² *Bliss v. Hall*, 4 Bing. N. C. 183; *Bamford v. Turnley*, 3 Best & S. 62, 70, 73; L. C. Torts, 467.

³ *Bliss v. Hall*, *supra*.

⁴ *Hurdman v. Northeastern Ry. Co.*, 3 C. P. Div. 168; *Whalley v. Lancashire Ry. Co.*, 13 Q. B. Div. 131; *Tootle v. Clifton*, 22 Ohio St. 247. See also *Martin v. Riddle*, 26 Penn. St. 415; *Kauffman v. Giesemer*, id. 407; *Ogburn v. Connor*, 46 Cal. 346; *Laumer v. Francis*, 23 Mo. 181. *Contra*, by other authorities. See *infra*.

⁵ *Hurdman v. Northeastern Ry. Co.*, *supra*.

might by these authorities be treated as a trespass, and therefore should be redressible though no damage had been sustained ; for otherwise a right to send the water there might eventually be acquired by prescription, to the substantial confiscation of the particular piece of land. For example : The defendant erects an embankment upon his land, whereby the surface water accumulating upon the plaintiff's land is prevented from flowing off in its natural courses, and caused to flow in a different direction over his land. This is a breach of duty for which the defendant is liable to the plaintiff, though the latter suffer no damage thereby.¹

More clearly then will the flooding of a neighbor's land create liability when damage is caused ; indeed, liability is held to be created not only where the water is thrown back by means of a dam, but also where a stream or a ditch is caused to overflow by turning into it water not naturally or entirely tributary to it. For example : The defendant, in the course of reclaiming and improving his land, collects the surface water of his premises into a ditch, and thereby greatly increases the quantity, or changes the manner, of the flow upon the lower lands of the plaintiff, to his damage. The defendant is liable.²

So far as the doctrine of the two preceding paragraphs applies to surface water, or water flowing through drains or ditches, and not in natural streams, it is rejected by some authorities. By these it is held that a coterminous proprietor may change the surface of his land by raising or filling it to a higher grade by the construction of dykes or other improvements, though the effect be to bring an accumulation of water on adjacent land, and to

Surface
water : drains
and ditches.

¹ *Tootle v. Clifton*, 22 Ohio St. 247. This, it should be observed, is not the case of bringing water, as by means of a reservoir, upon one's land (*Rylands v. Fletcher*, L. R. 3 H. L. Cas. 330 ; post, chapter xix.); for there the purpose is not to throw the water back but to hold it. Escape in such a case might not be a trespass.

² *Livingston v. McDonald*, 21 Iowa, 160. A purchaser would be liable for *continuing* the nuisance, at least after notice.

prevent it from passing off. The right to the free use of one's land above, upon, or beneath the surface cannot, it is deemed, be prevented by considerations of damage to others caused in that way, so long as the operations are carried on properly for the end in view.¹

If the water of a stream be polluted, or otherwise rendered useless, or perhaps materially less useful than it was before, whether it be surface or sub-surface water, and *Polluting water.* damage ensue to another riparian owner, he can maintain an action therefor, unless a right to do the thing has been acquired by statute or by grant or prescription.² In the case of statutory authority to pollute the waters of a stream however this doctrine is to be taken with qualification. It has been laid down in regard to such cases that a city is not liable for polluting by sewage the water of a stream which it has a right to use for that purpose, so far as the effect is the necessary result of the system of drainage adopted by the city; but it is otherwise if the pollution is attributable to the negligence of the city in managing the system or in the construction of sewers,³ or in any other particular. The right, whether statutory or otherwise, must be exercised in a reasonable and proper way.⁴

For milling and other purposes, for which some large or special use of the water of a stream is required, statutory *Mills.* rights are often granted, under various restrictions, to flood the lands lying along the mill-streams, or

¹ *Gannon v. Hargadon*, 10 Allen, 106; *Dickinson v. Worcester*, 7 Allen, 19; *Brown v. Collins*, 53 N. H. 443.

² *Wheatley v. Chrisman*, 24 Penn. St. 298; *O'Riley v. McCheeney*, 3 Lans. 278; *Merrifield v. Worcester*, 110 Mass. 316. See *Clowes v. Staffordshire Waterworks Co.*, L. R. 8 Ch. 125; *Goldsmid v. Tunbridge Wells Com'rs*, L. R. 1 Eq. 161, affirmed, L. R. 1 Ch. 349.

³ *Merrifield v. Worcester*, supra. See *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781, to the same effect in regard to the escape of water.

⁴ *Baxendale v. McMurray*, L. R. 2 Ch. 790. The fact that certain works, improperly constructed, in the public highway are satisfactory to the municipal authorities will not prevent them from being a nuisance. *Osgood v. Lynn R. Co.*, 130 Mass. 492.

to foul the water ; for the nature of which rights reference should be made to the statutes and the judicial interpretations of them.

With regard to actions for nuisances to personal enjoyment, it appears to be quite clear that for such smells or vapors proceeding from a neighbor's premises as are merely disagreeable, at least such smells or vapors as are the necessary effect of a business properly conducted there, no action is maintainable.¹ The noxious gases must produce some important sensible effect upon physical comfort. A person is indeed sometimes said to be entitled to an unpolluted and untainted stream of air for the necessary supply and reasonable use of himself and family ; but by the terms 'untainted' and 'unpolluted' are meant, not necessarily air as fresh, free, and pure as existed before the business in question was begun, but air not rendered to an important degree less compatible, or certainly not incompatible, with the physical comfort of existence.²

Bodily com-fort: smells and vapors.

The criterion therefore of liability for a supposed (private³) nuisance, affecting the bodily comfort of the plaintiff, is whether the inconvenience should be considered as more than fanciful, — more than one to mere delicacy or fastidiousness, — as an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and simple modes of life.⁴ On the other hand, it is

¹ See *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642 ; *Colls v. Home and Colonial Stores*, 1904, A. C. 179, 185 ; *Rushmer v. Polsue*, 1906, 1 Ch. 234, 244, — 'If a man lives in a street where there are numerous shops,' etc.

² *Walter v. Selfe*, 4 De G. & S. 315. See *Rushmer v. Polsue*, 1906, 1 Ch. 234 ; *Sturges v. Bridgman*, 11 Ch. D. 852, 865 ; *Colls v. Home and Colonial Stores*, supra.

³ It is doubtful if the right of action for injury by a public nuisance would stand on different ground ; but the court in *Walter v. Selfe* is careful to say that a private nuisance is there spoken of.

⁴ *Walter v. Selfe*, supra. See also *Rapier v. London Tramways Co.*,

not necessary that health should be impaired.¹ For example: The defendant erects upon his premises, adjoining the premises of the plaintiff, a kiln for the manufacture of bricks, and in the process of the manufacture the smoke and vapors and floating substances from the kiln are constantly directed to and within the plaintiff's house, so as to affect materially the comfort of himself and family as persons of ordinary habits of life. This is a breach of duty to the plaintiff, though it appear that the health of his family has actually been better since the erection of the kiln than before.²

It matters not what it is that produces the discomfort: smoke alone may be sufficient; so of noxious vapor alone; so of offensive smells alone. Whatever produces a material discomfort to human life in the neighborhood is a nuisance, for which damages are recoverable.³ But the provisions of statute in regard to such annoyances, arising from the carrying on of a lawful business, should always be examined.⁴

Liability for disturbing one's peace of mind appears to be more restricted, and to be confined to acts which would produce a like effect upon all persons, such as acts of indecency. If the disturbance, while affecting the plaintiff's mind disagreeably and seriously, would not so affect the mind of others generally, there is no ground of action. This is deemed to be the case of mere noise on Sunday or during religious worship. For example: The defendant disturbs the plaintiff during divine service in church, by making loud noises in singing, reading, and talking. This is no breach of duty to the plaintiff.⁵

¹ 1893, 2 Ch. 588, 600; *Crump v. Lambert*, L. R. 3 Eq. 409; affirmed 17 L. T. n. s. 133; *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392.

² *Rapier v. London Tramways Co.*, 1893, 2 Ch. 588, 600; *Walter v. Selfe*, supra. 'The test is whether the smell is so bad and continuous as to seriously interfere with comfort and enjoyment.' *Lindley*, L. J., in the first case.

³ *Walter v. Selfe*, supra.

⁴ *Crump v. Lambert*, supra.

⁵ In regard to smoke, under statutory provisions, see *Cooper v. Woolley*, L. R. 2 Ex. 88; *Smith v. Midland Ry. Co.*, 37 L. T. n. s. 224.

⁶ *Owen v. Henman*, 1 Watts & S. 548. See also *First Baptist Church*

§ 2. PUBLIC NUISANCES: WHAT MUST BE PROVED, ETC.

Thus far of private nuisances. In regard to public nuisances, it is to be observed that such become private nuisances as well, by inflicting upon a particular individual any special or particular damage; proof of such damage is enough. For example: The defendant, without authority, moors a barge across a public navigable stream, and harmfully obstructs the navigation thereof to the plaintiff, who at the time is floating a barge down the stream. This is a breach of duty to the plaintiff, for which the defendant is liable in damages.¹

Public may be
private nui-
sance: special
damage.

If however the discomfort, having the like effect upon all persons, produces no particular, actual damage to any individual, no individual can maintain an action for damages by reason of it. In other words, it is necessary to the maintenance of an action for damages for a public nuisance (as well as in the case of a private nuisance) that the plaintiff should have suffered actual, specific damage thereby,² and, by some authorities, damage distinct in kind.³

It matters not, by the current of authority, that the special damage sustained by the plaintiff is common to many, or to the whole neighborhood; enough if there is actual damage to his property, or injury to his health, or to his physical comfort (as explained in considering private nuisances). The injury inflicted upon private interests is not merged in the wrong done to the general public. For example: The defendants

v. Utica R. Co., 5 Barb. 79; *Sparhawk v. Union Ry. Co.*, 54 Penn. St. 401, cases of public nuisance.

¹ *Rose v. Miles*, 4 Maule & S. 101; s. c. L. C. Torts, 460. See also *Booth v. Ratté*, 15 App. Cas. 188.

² *Wesson v. Washburn Iron Co.*, 13 Allen, 95; *Milhau v. Sharp*, 27 N. Y. 612; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396; *Benjamin v. Storr*, L. R. 9 C. P. 460; *Fritz v. Hobson*, 14 Ch. D. 542.

³ *Shaw v. Boston & A. R. Co.*, 159 Mass. 597, 599, on the ground that if the damage is common to all the public, a multiplicity of suits might follow, which 'itself would be an intolerable evil.' *Shaw*, C. J., in *Quincy Canal v. Newcomb*, 7 Met. 276, 283.

carry on a large business as auctioneers near a coffee-house kept by the plaintiff in a narrow street in London. From the rear of the defendant's building, which there adjoins the plaintiff's house, the defendants are constantly loading and unloading goods into and from vans, and stalling their horses. This intercepts the light of the coffee-house so as to require the plaintiff to burn gas most of the daytime, obstructs the entrance to the door, and renders the plaintiff's premises uncomfortable from stench. The nuisance is a public one, but the plaintiff suffers a special and particular damage from it for which the defendant is liable to him.¹ Again: The defendants carry on a manufacturing business in such a way as to make themselves liable for causing a public nuisance. The plaintiff's premises are filled with smoke, and his house shaken so as to be uncomfortable for occupation. This is a breach of duty to the plaintiff, for which he is entitled to damages, though every one else in the vicinity suffers in the same way.²

It is however a difficult matter to state what sort of detriment will amount to special damage within the law of public

What will amount to special damage. nuisances. It appears to be necessary in the case of obstructions of public ways or waters that a particular user had been begun by the plaintiff, and that such user was interrupted by the wrong-

ful act of the defendant.³ Before the complaining party has entered upon the actual enjoyment of the public easement, the wrongful act does not directly affect him, or at least does not affect him in a manner to enable a court to measure the loss inflicted upon him. If he desire to make use of the easement, he can complain to the prosecuting officer, and require him to enter public proceedings against the offender; or (so it seems), he may proceed to make his particular use of the easement, and if the obstruction be not removed before he reaches

¹ *Benjamin v. Storr, supra.*

² *Wesson v. Washburn Iron Co., 13 Allen, 95.*

³ See *Rose v. Miles, 4 Maule & S. 101; s. c. L. C. Torts, 460.*

it, or in time for him to have the full enjoyment of passage, he may bring an action for the damage which he has sustained in the particular case by reason of the obstruction.

This latter proposition follows from the rule of law already noticed, that the plaintiff is not barred of a recovery in damages by reason of having notice of the existence of the nuisance when he put himself in the way of suffering damage from it.¹ Such a case does not come within the principle that a consenting party cannot recover for damage sustained by reason of an act the consequences of which he has invited,² since he has not consented to the act complained of, or invited its consequences. He may have reason to suppose that the obstruction will be removed before he reaches it; or, if not, he may well say that it is wrongful, and *must* be removed before he reaches it, on pain of damages for any loss which he may sustain by reason of its continuance.

If the obstruction of itself be insufficient to cause any actual damage, it is considered that no right of action can be derived by incurring expense in removing it. For example: The defendant obstructs a public footway, and the plaintiff, on coming to the obstruction, in passing along the way, causes the obstruction to be removed; and this is repeated several times. No other damage is proved. The defendant is not liable.³

It follows that the mere fact that the plaintiff has been turned aside by reason of the obstruction and caused to proceed, if at all, by a different route from that intended by him is not special damage; he must have suffered some specific loss by reason of being thus defeated in his purpose. And this would be true also of obstructions to the public wagon roads. For example: The defendant obstructs a public highway leading directly to the plaintiff's farm, and the plaintiff is thereby compelled to go to his land, if at all, with his team, by a longer and very circuitous road; but no specific

¹ *Ante*, p. 448.

² 'Volenti non fit injuria.'

³ *Winterbottom v. Derby*, L. R. 2 Ex. 316.

loss is proved. The defendant is deemed not liable to the plaintiff.¹

The case has been considered to be different if the way were of peculiar use to the plaintiff, as by being his only means of reaching his land with teams. For example: The defendant, by raising the water of his dam, floods a highway and renders it impassable; this highway furnishing the only means of reaching part in use of the plaintiff's farm. The defendant is deemed to be liable.²

¹ *Houck v. Wachter*, 34 Md. 265. *Contra*, *Brown v. Watrous*, 47 Maine, 161.

² *Venard v. Cross*, 8 Kans. 248. *Sed qu.*

ACTS AT PERIL.

CHAPTER XVIII.

DAMAGE BY ANIMALS.

Statement of the duty. A owes to B the duty to prevent his animals (1) from doing damage to B, if A has notice of their propensity to do damage, and (2) to prevent them from straying from his own upon B's premises.

§ 1. WHAT MUST BE PROVED, ETC.

Whoever keeps an animal with notice that it has a propensity to do damage is liable to any person, who, without fault of his own legally contributing¹ to the injury, suffers an injury from such animal ; and this, though the keeper be not guilty of negligence in regard to keeping it properly or securely. The gist of liability for the damage is the keeping of the animal after notice of the evil propensity ; proof accordingly makes a *prima facie* case.² For example: The defendant has a monkey, which he knows has a propensity to bite people.³ The plaintiff, without fault of her own, is bitten by the animal. The defendant is liable, however careful he may have been in keeping the monkey.⁴

Gist of liability : notice of propensity.

If the animal be *feræ naturæ*, it will probably be presumed that the defendant had notice of any vicious propensity

¹ As to this term, see *ante*, pp. 178-186.

² *May v. Burdett*, 9 Q. B. 101. See *Jackson v. Smithson*, 15 M. & W. 563; *Card v. Case*, 5 C. B. 622; *Popplewell v. Pierce*, 10 Cush. 509; *Oakes v. Spaulding*, 40 Vt. 347; *Clowdis v. Fresno Irrigation Co.*, 118 Calif. 315.

³ *Osborne v. Chocqurel*, 1896, 2 Q. B. 109.

⁴ *May v. Burdett*, *supra*.

whereby the plaintiff has suffered injury, since it is according to the nature of such an animal to do damage.¹ And even if the animal be domestic, the owner will be presumed to have notice of any propensity which is according to the nature of the animal. For example: The defendant's cattle stray into the plaintiff's garden, and beat and tear down the growing vegetables. The defendant is liable, though not guilty of negligence; since it is of the nature of straying cattle to do such damage.²

In the case of injuries committed by domestic animals not according to the nature of such animals, it is clear that the owner is not liable if he had no notice that the particular animal had any evil propensity.³ For example: The defendant's horse kicks the plaintiff, neither the plaintiff nor the defendant being at fault, and the defendant having no notice of a propensity of the horse to kick. The defendant is not liable; since it is not of the nature of horses to kick people, when not provoked to the act.⁴

Statutes have been passed, declaring it unnecessary in an action against the owner of a dog to prove notice of a propensity of the animal to injure sheep or cattle. In the absence of statute however the rule requiring notice of the vicious propensity prevails in regard to dogs as well as with regard to other domestic animals.⁵

While however negligence in the owner of the animal is not necessary to constitute a breach of duty when the Negligence. 'scienter' can be proved, negligence in the care of the animal will render the owner liable, though he did not know of the propensity.

¹ If a wild animal has been tamed and domesticated, the case may be different. See arguments in *May v. Burdett*, supra.

² See *Cox v. Burbridge*, 13 C. B. N. S. 430, 438, Williams, J.

* L. C. Torts, 490.

⁴ *Cox v. Burbridge*, supra. The plaintiff was a boy playing in the highway at the time of the injury, but there was no evidence that he had done anything to irritate the horse.

⁵ See L. C. Torts, 490.

When damage is done by animals upon the *owner's premises*, a different question, or set of questions, may arise. The case will ordinarily turn upon negligence, and negligence of a special kind, to wit, with reference to the occupancy of premises. The place where the damage was done may enter into the case; a bull may well be left at large in the owner's field, while a savage dog should not be.¹ And then the character in which the person hurt entered the premises will have to be considered in determining the question of duty. Such person may have been 'invited' to enter; he may have been a trespasser; he may have been a bare licensee. The owner of premises obviously owes a duty to persons whom he induces to come there for his benefit, to wit, that they may do so safely so far as his own conduct is concerned; while towards others his duty may be very different. And in all these cases there may be a question of the effect of notice by the occupant, or knowledge by the person injured, of the state of things. For the principles touching such cases the reader must look to that part of the chapter on Negligence, relating to the Use of Premises.²

§ 2. ESCAPE OF ANIMALS: WHAT MUST BE PROVED, ETC.

By the common law of England and of most of our States the owner of land is bound to keep it fenced;³ and if his animals escape and get into his neighbor's premises, *Duty to fence* he is liable for the very act as for trespass,⁴ whether the escape was owing to his negligence or not.⁵

¹ *Loomis v. Terry*, 17 Wend. 496.

² Chapter iii., § 13, ante, p. 152. Section 14, p. 168, on assuming the risk, should also be noticed.

³ See ante, p. 69.

⁴ *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10, 13; *Lee v. Riley*, 18 C. B. n. s. 722. As to dogs see *Read v. Edwards*, 17 C. B. n. s. 245.

⁵ *Myers v. Dodd*, 9 Ind. 290; *Webber v. Closson*, 35 Maine, 26. How strong the common law upon this subject is, is shown by cases applying the rule unhesitatingly to strays from open commons. See Year Book,

Proof of the animal's coming upon the plaintiff's premises is enough. The same is true indeed though the defendant's animals may not have escaped from his enclosure; if still an animal commit damage, by putting part of its body over, through, or beyond the boundary line, the defendant will be liable regardless of negligence. For example: The defendant's horse bites and kicks the plaintiff's horse through the partition fence between the plaintiff's and defendant's premises. The defendant is liable, though not guilty of negligence.¹

The common-law rule however has been variously modified by statute in this country; and in some of the Western States it is held inapplicable to the condition of things.²

The escape of animals from the highway along which they are being driven or led is a different thing. This latter is not

Escape of ani- a trespass, that is, a breach of absolute duty; lia-
mals from the bility on the contrary turns upon negligence on
highway. the part of the owner or his servants.³ Trespass-
ing or straying animals, it may be added, should not be injured unnecessarily in driving them away.⁴

20 Edw. 4, 11, pl. 10, where to an action of trespass with cattle the defendant pleaded that his land adjoined a place where he had common, and that his cattle *strayed from the common*, and that he drove them back as soon as he could. The plea was held bad, the court saying that if the land in which the defendant had common was not enclosed, he must still keep his beasts there and out of the land of others.

¹ *Ellis v. Loftus Iron Co.*, *supra*.

² *Kent, Com.* iii. 438, note 1, 13th ed.; *Kerwhacker v. Cleveland R. Co.*, 3 Ohio St. 172.

³ *Goodwin v. Cheveley*, 4 H. & N. 631; *Tillett v. Ward*, 10 Q. B. D. 17, where an ox strayed into a shop.

⁴ *Ante*, p. 388.

CHAPTER XIX.

ESCAPE OF DANGEROUS THINGS.

Statement of the duty. A owes to B the duty (by the law of England) to prevent the escape of any dangerous thing, to the damage of B, brought or made upon the premises of A ; the escape being due to defects within the control, though it may be not within the knowledge, of A.

§ 1. NATURE OF PROTECTION REQUIRED: WHAT MUST BE PROVED: ENGLISH DOCTRINE.

The duty considered in the preceding chapter of restraining animals from doing damage has been treated in *England* as furnishing ground for an analogous duty with reference to inanimate things of a peculiarly dangerous character, which the occupant of premises has brought or made thereon, — the duty, to wit, so to keep such things that they shall not do mischief to the occupant's neighbor. Proof of the escape of the dangerous thing, to the damage of the plaintiff, makes a *prima facie* right of action.

But the rule is not to be taken without caution. It is laid down that where the owner of land, without negligence or other misconduct, uses his land in the ordinary manner, he will not be liable in damages, though mischief should thereby be occasioned to his neighbor.¹ Still a person who, for his own purposes, brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must, by the law of England, keep

Analogy to
damage by
animals.

Use of land in
ordinary man-
ner: mines
and reser-
voirs.

¹ Chasemore v. Richards, 7 H. L. Cas. 349. As to malice see id. 388, and ante, p. 23.

it there at his peril ; and if he does not, he will be answerable, *prima facie*, for all the damage which is the natural consequence of its escape ; and this however careful he may have been, and whatever precautions he may have taken to prevent the damage.¹ For example : The defendants construct a reservoir on land separated from the plaintiff's colliery by intervening land. Mines under the site of the reservoir, and under part of the intervening land, have been formerly worked ; and the plaintiff has, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his own colliery and the old workings under the reservoir. It has not been known to the defendants, or to any person employed by them in the construction of the reservoir, that such communication exists, or that there have been any old workings under the site of the reservoir ; and the defendants have not been personally guilty of any negligence. The reservoir is in fact, but without the defendants' knowledge, constructed over five old shafts, filled with rubbish and other loose material, and leading down to the workings ; and the reservoir having been filled with water, the water bursts down these shafts and flows by the underground channel into the plaintiff's mines, producing damage. The defendants are liable.²

¹ *Rylands v. Fletcher*, L. R. 1 Ex. 265, Ex. Ch.; L. R. 3 H. L. 330; Cases, 405. The decision of the Court of Exchequer (3 H. & C. 774) was reversed. See *National Telephone Co. v. Baker*, 1893, 2 Ch. 186.

² *Rylands v. Fletcher*, *supra*. See *National Telephone Co. v. Baker*, 1893, 2 Ch. 186. The general rule above stated has been the subject of great discussion on both sides of the Atlantic, since *Rylands v. Fletcher* was decided. It has been denied by some of the American courts, and adopted or favored by others. It is denied by *Losee v. Buchanan*, 51 N. Y. 476, by *Cumberland Telephone v. United Electric Co.*, 42 Fed. Rep. 273, by *Brown v. Collins*, 53 N. H. 442, and by *Marshall v. Melwood*, 38 N. J. 339; it is favored by *Shipley v. Fifty Associates*, 106 Mass. 194, *Baltimore Breweries Co. v. Raustead*, 28 Atl. Rep. 273 (Md.), and other cases. See *infra*. Some tendency to modify it has been shown in England, but that is as much as can be said. *Ponting v. Noakes*, 1894, 2 Q. B. 261, noxious trees on and wholly within one's land. In substance the rule stands. See *Pollock, Torts*, 421-428, 2d

The owners of the upper tenement have however, as has already been intimated, in such cases, a right to work their premises in the ordinary, reasonable, and proper manner, and are not liable for the effects of water which flows down into the lower tenement by mere force of gravitation. But where some unusual and extraordinary effort is put forth for effecting the occupant's purpose, the owner is liable for the injurious results which follow.¹ For example: The defendant, owner of a coal-mine above the plaintiff's mine, works out the whole of his coal, leaving no barrier between his mine and the plaintiff's, the consequence of which is, that the water percolating through the upper mine flows into the lower one, and obstructs the plaintiff in getting out his coal. This is no breach of duty by the defendant; the water having flowed down in its natural course, and the defendant being entitled to remove all his coal.² Again: The defendant, under the like circumstances, does not merely suffer the water to flow through his mine in its natural way, but, in order to work his mine beneficially, pumps up quantities of water which pass into the plaintiff's mine, in addition to that which would naturally have reached it, whereby the plaintiff suffers damage. This is a breach of duty to the plaintiff, though it is done without negligence and in the due working of the defendant's mine.³

If the damage be produced by vis major or by the act of God,⁴ or otherwise, without the intervention of acts or

ed. 'The authority of *Rylands v. Fletcher* is unquestioned, but *Nichols v. Marsland* [L. R. 10 Ex. 255, 2 Ex. Div. 1] has practically empowered juries to mitigate the rule, whenever its operation seems too harsh.' Id. p. 428, 2d ed.

¹ *Rylands v. Fletcher*, supra; *Fletcher v. Smith*, 2 App. Cas. 781; *Baird v. Williamson*, 15 C. B. n. s. 376.

² *Smith v. Kenrick*, 7 C. B. 515, 564.

³ *Baird v. Williamson*, supra.

⁴ *Nichols v. Marsland*, L. R. 10 Ex. 255; s. c. 2 Ex. Div. 1, showing that this term includes events which human foresight could not reasonably anticipate. This case in both stages is very instructive.

omission of duty by the occupant or those for whom he is responsible, the case will be different. In the example given, if the damage had been caused by lightning bursting the reservoir,¹ and not by reason of the existence of the openings into the lower mines, the defendants would not have been liable. Again: The defendant's tenants, the plaintiffs, occupy the lower story of a warehouse, of which the defendant occupies the upper. A hole has been gnawed by rats through a box into which water from the gutters of the building is collected, to be thence discharged by a pipe into the drains. The water, now pouring through the hole, runs down and wets the plaintiff's goods. The defendant is not liable.² Again: The defendant owns premises on which stand yew-trees, which to his knowledge are poisonous. A third person clips some of the branches, which fall upon the plaintiff's land, and poison the latter's horses. The defendant is not liable.³

Again, if the bringing the dangerous thing upon the occupant's land, and all the works connected therewith, be effected under sanction of legislative authority, the fact that they result in damage to the party's neighbor by purely natural escape or by authorized channels, and not by reason of negligence attributable to the occupant, will not render the occupant liable.⁴ It is also certain, a fortiori, in such a case, that, if the escape be caused by the act of God, no liability follows. For example: The defendant is charged by law with the duty of maintaining water tanks in his district for purposes of irrigation, as part of a national system of irrigation, for the welfare of the people. By reason of an extraordinary flood, and not by reason of

¹ *Rylands v. Fletcher*, L. R. 3 H. L. 330.

² *Carstairs v. Taylor*, L. R. 6 Ex. 216; *Ross v. Fedden*, L. R. 7 Q. B. 661. See *Doupe v. Genin*, 45 N. Y. 119. But see *Marshall v. Cohen*, 44 Ga. 489.

³ *Wilson v. Newberry*, L. R. 7 Q. B. 31.

⁴ See *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679.

the bad condition of the works, one of these tanks gives way, causing damage to the plaintiffs. The plaintiffs cannot recover therefor.¹

On the other hand, if the works be of a nature to require legislative sanction, the proprietor or manager, when not having it, will be liable for damage produced by any escape or breaking thereof, however occurring. For example: The defendants make use of locomotive engines, without having obtained the necessary authority of law, and the plaintiff suffers damage by reason of fire proceeding from the same. The defendants are liable, though not guilty of any negligence in the management of the engines, and though they would not have been liable had they had the proper authority.²

§ 2. THE AMERICAN LAW.

The foregoing is the law of England. The American law cannot be said as yet to have become settled in regard to this subject. The authorities are conflicting, but the tendency appears to be towards the English doctrine — making the keeper of *certain* things naturally dangerous a virtual insurer, *prima facie*, against harm from them.³

It has been laid down accordingly in this country, that one who knowingly keeps large quantities of nitro-glycerine, dynamite, or gunpowder on one's premises must keep it from doing harm by explosion, though one complies with the law regulating such

American law
not settled :
points de-
cided.

¹ Madras Ry. Co. v. The Zemindar, L. R. 1 Ind. App. 364.

² Jones v. Festiniog Ry. Co., L. R. 3 Q. B. 733; Vaughan v. Taff Vale Ry. Co., *supra*.

³ Bradford Glycerine Co. v. St. Mary's Woolen Co., 45 L. R. A. 658 (Ohio); Kinney v. Gerdes, 116 Ala. 310; Rudder v. Gerdes, id. 332; Shipley v. Fifty Associates, 106 Mass. 194; Wilson v. New Bedford, 108 Mass. 261. Contra, Losee v. Buchanan, 51 N. Y. 476. See Harvard Law Rev., March, 1900, p. 600. The Alabama cases however put the wrong as one of nuisance.

things and is not guilty of negligence.¹ So too it has been decided that the occupant of premises may be liable for damage caused by the fall of ice or snow from the roof of his building when the roof is so constructed as to make it substantially certain that, if the snow be not removed, accidents from snow-slides will occur; although the roof be constructed in the usual manner of the time.² And with regard to water collected in reservoirs, it is held that the embankments must be so thoroughly constructed that the water cannot percolate through them.³

The doctrine has also been laid down that where the alleged rights of adjoining land-owners conflict, it is better that one of them should yield to the other and forego a particular use of his land, rather than, by insisting upon that use, deprive the other altogether of the use of his property; which might often be the consequence of carrying on the operation. This would of course be an obvious principle if stated with regard to a nuisance; but it is treated as applicable to other wrongs as well. For example: The defendants, in the course of digging a canal through their land, for which purpose they are clothed with legislative authority,⁴ find it necessary to blast rocks by the use of gunpowder. The result of the blasting is to throw fragments of rock against the plaintiff's house, whereby the plaintiff suffers damage. The defendants are deemed liable, though not guilty of negligence.⁵

A distinction has however been declared to exist between an injury sustained in that way, and one sustained by the explosion of a boiler on the defendant's premises. For

¹ Bradford Glycerine Co. v. St. Mary's Woolen Co., *supra*.

² Shipley v. Fifty Associates, 106 Mass. 194; Fitzpatrick v. Welch, 174 Mass. 486. But in some States it is enough that ordinary care was, exercised. Underwood v. Waldron, 33 Mich. 232, 238; Garland v. Towne 55 N. H. 55.

³ Wilson v. New Bedford, 108 Mass. 261; Pixley v. Clark, 35 N. Y. 520.

⁴ The work could not therefore be a nuisance when carefully conducted.

⁵ Hay v. Cohoes Co., 2 N. Y. 159.

damage sustained in the latter way, it is deemed that no right of action arises unless the explosion was due to negligence of the manager.¹ The use of a boiler is not necessarily dangerous.

§ 3. SOCIAL PRESSURE AS A FACTOR.

The analogy, sometimes suggested, of the duty of owners of reservoirs to the duty of the keeper of a dangerous animal, appears far-fetched ; it is putting the worse for the better reason. It is easy to make a case against the keeper of the dangerous animal, and difficult for such a person to make defence, because of the instinctive feeling against the keeping and the keeper. The man who will expose people to danger from savage beasts, whether for profit or from want of ordinary feelings of humanity, is not likely to find favor with any one, especially with impartial judges of conduct.

The dangerous animal a false analogy.

There is nothing in such a case to suggest liability for damage due to the escape of things in their nature necessary or beneficial or incident to human life. It may indeed be true that one who suffers harm in this latter way will find it easy to state a cause of action, while the other party finds it difficult to make defence, but there should be no need to resort to sophistry for a reason. Difference of physical conditions may be passed over, as of course affecting a case ; but assuming such conditions to be practically the same, social conditions may be different and differ in urgency. Social pressure may or may not be strong enough to make it clear that the acts of the defendant should be at his own risk. A settled social or economic emphasis throughout a State will be apt to be reflected in the action of the courts.²

¹ *Losee v. Buchanan*, 51 N. Y. 476. In this case the rule in *Rylands v. Fletcher*, *supra*, is denied.

² See for instance *Massett v. Keff*, 41 So. Rep. 330 (La.), provocation to an assault,—a very interesting case of the effect of the social atmosphere.

The relevancy of such pressure will become plain by supposing facts which modify the situation. If an earthquake break the masonry of the reservoir, or cause the fall of snow and ice from the building, the defendant would doubtless escape liability even where the rule of insurance is upheld. Pressure in favor of the plaintiff would be absent, or greatly diminished, in such a case.

Absence of social or economic pressure would mean practical equality between the parties, and in that case the courts Equality : negligence. would be likely to add to the requirements of a cause of action, and to make defence less difficult than would be true under pressure. The plaintiff might accordingly be required to prove negligence ; or if proof of damage should be considered enough to create a presumption of negligence, in view of the danger, the defendant might be allowed to overturn the presumption in the usual way, by showing care, skill, and diligence suited to the case. In a word, it is difficult to understand how the courts can treat the situation as calling for insurance of safety unless the social atmosphere is such as to require the rule.¹

¹ As in the case of other wrongs, this is a matter of pleasure and pain. The pleasure of the defendant caused the general feeling of insecurity, and that was followed by the particular harm. The judge (or judge and jury) in such cases will know the general feeling, in other words the pressure of the community, from the situation. If there is no general feeling, there will be no pressure, as for instance where the harm was caused by what is usually termed the act of God or the public enemy; such things being uncommon, there could be no general feeling of insecurity. *Nichols v. Marsland*, L. R. 10 Ex. 255, 2 Ex. Div. 1, was such a case. One's ideas are fashioned mainly by the sum total of the facts which make up one's environment, each fact according to its pressure. See the article by Brooks Adams, Green Bag, January, 1907, *The Modern Conception of Animus*.

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